Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1998

Wayne King,

Petitioner,

v.

Charles Beavers,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. The United States Court of Appeals for the Eighth Circuit held that Petitioner had not shown that he was deprived of a federal constitutional right. The question presented:

WHETHER OR NOT A PERSON IS DEPRIVED OF HIS FEDERAL CONSTITUTIONAL RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS WHEN HE IS FORCIBLY REMOVED FROM HIS HOME BY A DEPUTY SHERIFF UNDER THE AUTHORITY OF AN INVALID GUARDIANSHIP ORDER.

II. The United States Court of Appeals for the Eighth Circuit held that Respondent was entitled to qualified immunity. The question presented:

WHETHER A COUNTY DEPUTY SHERIFF IS ENTITLED TO QUALIFIED IMMUNITY WHEN HE REMOVES SOMEONE OUT OF HIS HOME AND THEN CONTINUES TO HOLD THAT PERSON IN CUSTODY AND TAKE HIM OUT OF THE DEPUTY'S JURISDICTION AND THEN OUT OF THE STATE.

III. The United States Court of Appeals for the Eighth Circuit found almost all of the facts in a light most favorable to the Respondent. The question presented:

HAS THE EIGHTH CIRCUIT CHANGED THE STANDARD OF REVIEW FOR PRETRIAL QUALIFIED IMMUNITY MOTIONS BY ACCEPTING AS TRUE THE FACTS ALLEGED BY THE RESPONDENT AS OPPOSED TO THOSE ALLEGED BY THE PETITIONER?

LIST OF PARTIES

Wayne King, Plaintiff/Petitioner

Charles Beavers, Defendant/Respondent

Marilyn Johnson, Defendant

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Wayne King, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit granting qualified immunity to the respondent, Charles Beavers.

Opinions Below

The United States District Court for the Western District of Arkansas, Fort Smith Division,

denied Respondent's motion for summary judgment on the basis of qualified immunity. *King v. Johnson and Beavers* (U. S. District Court, Western District of Arkansas, Fort Smith Division No. 96-2219, August 1, 1997). Respondent took an immediate appeal which was decided by the United States Court of Appeals for the Eighth Circuit on July 9, 1998. *King v. Beavers,* 148 F.3d 1031 (8th Cir. 1998). The Eighth Circuit reversed the District Court.

Prior to the Eighth Circuit's decision, Marilyn Johnson filed a motion for summary judgment which was decided on May 4, 1998. The District Court held that Johnson was entitled to summary judgment based on a good faith defense. *King v. Johnson and Beavers* (U.S. District Court, Western District of Arkansas, Fort Smith Division No. 96-2219, May 4, 1998). Petitioner has appealed the grant of summary judgment to Marilyn Johnson to the U. S. Court of Appeals for the Eighth Circuit. The appeal is still pending. To this date, to counsel's knowledge, neither District Court opinion has been published.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was filed on July 9, 1998. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of these provisions are found in the Appendix.

U. S. Const. Amend. IV

U. S. Const. Amend XIV §1

Ark. Code Ann. §28-65-212

Ark. Code Ann. §28-65-213(e)

STATEMENT OF THE CASE

Wayne King (hereinafter "Wayne" or "King"), Petitioner, filed his complaint against Marilyn Johnson and Charles Beavers, Respondent, alleging that they had violated 42 U.S.C.A. §§1983 and 1988, falsely imprisoned him and committed outrageous conduct against him. The complaint was filed in the U. S. District Court for the Western District of Arkansas, Fort Smith Division. Jurisdiction was based on 28 U.S.C.A. §§1331, 1343 and 1367. Beavers and Marilyn both answered. Beavers filed a motion for summary judgment on the ground of qualified immunity. Wayne filed a timely response. On August 1, 1997, the District Court denied Beavers' motion on the ground that he was not entitled to qualified immunity. The District Court stayed the case so that Beavers could appeal immediately. On July 9, 1998, the U. S. Court of Appeals for the Eighth Circuit reversed the District Court and granted qualified immunity. *See, King v. Beavers,* 148 F.3d 1031 (8th Cir. 1998); (2-A–12-A). On May 4, 1998, the District Court granted summary judgment to Marilyn Johnson on the basis of a good faith defense. (33-A–76-A).

In 1995, Wayne, then 77 years old, lived in Clarksville, Arkansas with his wife, Bonnie King. Bonnie had for many years had health problems due to the removal of her parathyroid glands in 1947 and dementia. Wayne had been responsible for taking care of her since 1947 because of her parathyroids. Wayne and Bonnie had lived in

California, where Wayne had worked in the highway department. They had one daughter, Marilyn, who did not, and still does not, get along with her father.

After Wayne retired, he and Bonnie moved to Arkansas in 1984. Lela King, Wayne's mother, is 96 years old and lives with Wayne's brother, Claud, who resides in Fort Smith, Arkansas. Clarksville is approximately 65 miles from Fort Smith. From the time that Wayne and Bonnie moved to Arkansas until they were taken back to California, Johnson visited them three times, including the time at issue here.

On October 30, 1995, Betty Tudor, a social worker for the Arkansas Department of Human Services, Adult Protective Services, apparently contacted Marilyn about her parents. Bonnie at the time suffered from dementia. Wayne had some health workers who assisted him in taking care of her, but they did not get along with Wayne. These nurses then reported Wayne to Tudor, who called Marilyn.

The basis for Tudor's concern was that she felt it was dangerous for a couple in their seventies to take a nap in the dark in the afternoon. On one occasion, she went to their house. When they did not respond immediately she let herself in and found them in bed in the middle of the afternoon. She feared for Bonnie's condition but found her to be all right. Wayne would take naps in the afternoon, but he would often be up late taking care of Bonnie and would need some rest.

However, Tudor believed that Wayne was a threat to himself and Bonnie. She called Wayne's sister in California, Pauline Buffington, and Marilyn, who was also in California. Pauline at first was to go to Arkansas on November 6, 1995. However, Marilyn's husband, Steve, stated that "they did not want war" and told Pauline that Marilyn would fly to Arkansas. Marilyn then flew to Arkansas on November 10, 1995. During this time, Marilyn began to plot with Tudor how to obtain a guardianship over her parents.

Tudor told Marilyn that if she did not get a guardianship that the State would. However, Tudor had told Pauline Buffington that Bonnie should stay at home. Marilyn enlisted the services of Bruce Wilson, the Deputy Prosecuting Attorney for Johnson County, Arkansas, which is where Clarksville is located. Even though he is a Deputy Prosecutor, Wilson is allowed to maintain a private law practice.

Without consulting any other family members, on November 17, 1995, a petition for guardianship was filed on Marilyn's behalf by Wilson. Wayne and Bonnie were never served with the Petition or the notice that a hearing was to be held on November 21, 1995. On November 21, a hearing was held to determine whether or not to grant Marilyn guardianship over her parents. Wayne and Bonnie were not present because they had not been given notice of the hearing.

Marilyn presented as evidence an unsworn letter from Dr. Patterson, who had not treated

Wayne since 1993, which stated that Wayne was perhaps a threat to himself and his wife. This violated Arkansas law in two different ways. First, the letter was not sworn, which made it inadmissible, and second, the letter did not provide clear and convincing evidence that Wayne or Bonnie was incompetent. *See,* Ark. Code Ann. §28-65-212 and 213(b); *In re Bailey,* 299 Ark. 352, 771 S.W.2d 779 (1989). Despite the fact that neither Wayne nor Bonnie was present, that the medical testimony was unsworn and that it did not meet the clear-and-convincing burden of proof, the Johnson County Probate Court issued an Order and Letters of Guardianship to Marilyn. She also utilized the temporary guardianship procedure to obtain a permanent guardianship. *See,* Ark. Code Ann. §28-65-218.

Marilyn was not physically capable of being a guardian. At first, Marilyn could not go to Arkansas because of her health problems. In recent history, Marilyn has had two seizures, which forced her to quit her job. She also cannot drive a car and has problems with her back.

Wayne on the other hand had taken care of Bonnie for nearly 50 years. It was Wayne who arranged for meals to be delivered to the house, and he usually supplemented them. The house was well taken care of and clean. Wayne made sure that Bonnie had appropriate undergarments for her incontinence. In contrast to Marilyn's inability to drive, Wayne was a good driver and would drive to Fort Smith to see the doctor. He would also take Bonnie to have her hair done.

Marilyn decided that, even though her parents owned a home in Clarksville and had family in nearby Fort Smith, she should take them to California. Marilyn, without any warning to Wayne and Bonnie and having never told anyone in the family about the guardianship, moved them to California on November 29, 1995.

To move them, Marilyn again enlisted the aid of Betty Tudor. Wayne, however, refused to get out of his bed and refused to go to California. Marilyn and Tudor then called on Charles Beavers to help them remove Wayne and Bonnie from their home. Beavers arrived in his patrol car and at first tried to talk Wayne into leaving, but Wayne refused. Beavers then called Wilson in his capacity as Deputy Prosecuting Attorney for Johnson County. Wilson told Beavers that Wayne must go with Marilyn. After further unsuccessful attempts to coax Wayne into leaving, Beavers apparently called Wilson again. Wilson instructed Beavers that, if Wayne would not get out of bed, to remove him physically.

Beavers, despite Wayne's protests, picked Wayne up out of his bed and carried Wayne to Beavers' patrol car. Along the way, he bumped Wayne into a bathroom-door facing, injuring Wayne's back and side. To this day, Wayne still has problems with his back. Beavers put Wayne into the back set of the patrol car behind the partition like he would an arrested suspect. Wayne never gave his permission to be taken out of the house to Beavers or Marilyn. Wayne was not even

allowed to change clothes. He was taken in his pajamas.

Wayne and Bonnie were separated. Marilyn took Bonnie in her vehicle, and Beavers took Wayne in his patrol car. Marilyn directed Beavers to take Wayne to the Clarksville Medical Group offices. She followed with Bonnie. When Beavers arrived at the Clarksville Medical Group with Wayne, a nurse came from the back door of the clinic and administered some kind of injection to Wayne as he sat in the car.

Wayne and Bonnie were then taken to the Little Rock airport. At some point, Beavers was told by Sheriff Nicklas that it was permissible for him to go to Little Rock and then on to California. Wilson also advised Beavers that he could go to Little Rock. It was determined that Beavers would go all the way to California as long as Johnson County was not responsible for the expenses.

When the four of them arrived at Little Rock, Wayne was finally allowed to put on socks and shoes, but he was still in his pajamas. While at the Little Rock airport, Wayne was escorted at all times by Beavers. He was kept separate and apart from his wife, who was escorted by Marilyn. Beavers escorted Wayne onto the plane. Beavers remained seated next to Wayne at all times for the duration of the trip. Wayne did not converse with Beavers on the flight. They flew from Little Rock to Dallas, Texas, where connections were made to San Jose, California. In the Dallas airport, Wayne was again kept separated from his wife. He was

escorted by Beavers, and Bonnie was escorted by Marilyn On the flight to San Jose, Beavers again sat next to Wayne. Upon arriving at the San Jose airport, Beavers escorted Wayne off the plane, whereupon he was paid $430 in cash.

In California, Wayne and Bonnie initially stayed at Marilyn's house, which sits in a remote area on about 40 acres. It is fenced in. However, Bonnie then went into the hospital and then to a nursing home where she died March 31, 1996. Wayne remained in Marilyn's house, essentially a prisoner. He was not allowed to answer the phone, and Marilyn kept tabs on whom Wayne talked to. Wayne was perfectly capable of taking care of himself and was not a suicide threat as alleged by Marilyn. Wayne prepared his own meals in California and made sure he had clean clothes. Marilyn, however, still spoke negatively about her father. She attempted to obtain a conservatorship over Wayne in California. She and her California attorney tried to convince Lisa Morello, one of the persons whom Marilyn hired to watch Wayne, to testify untruthfully at the California conservatorship hearing. Morello refused. At that hearing, the court-appointed expert stated in her report that Wayne was perfectly competent, and the judge refused to appoint a conservator. The expert determined that Wayne was a man of strong opinions and great ability to think and act in his own best interests. Wayne was present at the California hearing. Only at that point did Marilyn agree to dismiss her petitions in California and Arkansas. Wayne returned home to Clarksville.

In the meantime, Marilyn continued to be a conservator over Bonnie and kept her in a California nursing home. Bonnie died in California and was buried there. The expert in the California conservatorship hearing had stated that Wayne should have a say in Bonnie's care. However, Marilyn buried Bonnie in California, even though Wayne was in Arkansas.

REASONS FOR GRANTING THE PETITION

I. This case presents an important question as to whether a person is deprived of his constitutional rights under the Fourth and Fourteenth Amendments when he is forcibly removed from his home under the authority of an invalid court order.

The Fourth Amendment states that "[T]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." U. S. Const. Amend. IV. The United States Supreme Court has already recognized that

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, 898. The Fourth Amendment protects people, not just places. *Terry,* 20 L.Ed.2d at 899. Furthermore, it protects "the people," not just the criminally charged. *Cofield v. Randolph County Com.,* 90 F.3d 468, 472 (11th Cir. 1996) (Goodwin, Senior Circuit Judge, dissenting).

The Fourth Amendment is not a trial right, but it affords protection against governmental in-

trusion into one's home and affairs to all citizens. *Kimmelman v. Morrison,* 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305, 318 (1986). The Fourth Amendment's protection applies in the civil context as well. *Soldal v. Cook County,* 506 U.S. 56, 67, 113 S.Ct. 538, 121 L.Ed.2d. 450, 462 (1992). The gravamen of a Fourth Amendment claim is that the complainant's legitimate expectation of privacy has been violated by an illegal search or seizure. *Kimmelman,* 91 L.Ed.2d at 318. In order to prevail, the plaintiff need only prove that the search or seizure was illegal and that it violated his reasonable expectation of privacy in the item or place at issue. *Id.*

The Fourth Amendment is a primary source of constitutional protection against physically abusive government conduct. *Gardner v. Buerger,* 82 F.3d 248, 251 (8th Cir. 1996) (citing *Graham v. Conner,* 490 U.S. 386, 394, 109 S.Ct. 1865, 1870-71, 104 L.Ed.2d 443 (1989)). For Fourth Amendment purposes, a police officer seizes a person when by physical force or show of authority he limits that person's liberty. *Id.* (citing *California v. Hodari D.,* 499 U.S. 621, 625-26, 111 S.Ct. 1547, 1550-51, 113 L.Ed.2d 690 (1991)). In a Fourth Amendment case, what matters is the intrusion on the people's security from governmental interference. *Soldal,* 506 U.S. at 69, 121 L.Ed.2d at 463. The U. S. Supreme Court has held that seizures of property are subject to Fourth Amendment scrutiny even though no search within the Fourth Amendment has taken place. *Id.*

Petitioner has alleged a violation of the Fourth Amendment, and the Eighth Circuit has erred in holding that he has not. The Eighth Circuit's holding conflicts with the Court's decision in *Soldal,* in which a person's mobile home was illegal seized by a deputy sheriff. 121 L.Ed. at 458. In this case, Petitioner's home has not been seized, but his very person. The guardianship order on which Respondent relied, though appearing facially correct, was invalid and did not give Marilyn Johnson authority to take King into custody, let alone Beavers. It was on the authority of that order that Beavers seized King against his will and physically carried him out of his home, injuring his back. Beavers then transported King out of Beavers' jurisdiction to Little Rock, Arkansas and then, still using his authority as a Johnson County deputy sheriff, took Wayne on an airplane which traveled from Little Rock, Arkansas to Dallas, Texas to San Jose, California. Even if the guardianship order and letters were valid, they still did not grant any authority to a Johnson County deputy sheriff to act. They only gave custody and control to Marilyn Johnson, not Charles Beavers.

Below, Beavers attempted to compare the guardianship order and letters to an arrest warrant. It is not an appropriate analogy. An arrest warrant is specifically directed to a law-enforcement officer and commands him to arrest a person. When an officer receives an arrest warrant, the face of the warrant tells the officer that a judge has reviewed all of the supporting materials and believes there is probable cause for the officer

to arrest the person named in the warrant. The letters and order in this case do not command Beavers to arrest or seize King. The face of the order only gives Marilyn Johnson authority to act, not Beavers.

In *Hurlman v. Rice,* a mother was temporarily restrained by a family court from residing with her minor child's grandfather, her father. 927 F.2d 74 (2d Cir. 1991). The mother disobeyed the order, and the child's father, a police officer, contacted some of his friend who were state troopers. *Id.* The troopers entered the home without the mother's or grandfather's permission and took the child. *Id.* In that case, the Second Circuit found that the Fourth Amendment applied. *Id.* (Citing *Payton v. New York,* 445 U.S. 573, 584-90, 100 S.Ct. 1371, 1378-82, 63 L.Ed.2d 629 (1980)). In this case, the Eighth Circuit has found that the Fourth Amendment does not apply in a guardianship proceeding when the proposed ward is seized against his will by a deputy sheriff without any authority. *King,* 148 F.3d at 1034, n. 3). The Eighth Circuit's decision in this case is in conflict with the Second Circuit's decision in *Hurlman.* Furthermore, the Eighth Circuit's decision is in conflict with this Court's previous decisions holding that the Fourth Amendment protects people and not just items or privacy. If the Fourth Amendment applies when a person's mobile home is physically seized and towed to a different lot (*See, Soldal,* 121 L.Ed. at 462), surely the Fourth Amendment applies when an individual's very "person" is seized by a government official and transported to another state.

The Eighth Circuit held that King had not pled that there was a violation of the Fourth Amendment. In *Soldal,* the complaint alleged that the deputy sheriffs acting under color of state law dispossessed the Soldals of their trailer home by physically tearing it from its foundation and towing it to another lot. 121 L.Ed.2d at 465. This Court held that those facts, as alleged, sufficed to constitute a "seizure" within the meaning of the Fourth Amendment. *Id.* In this case, King has alleged that Beavers took him out of his home under color of law and transported him across several states against his will without proper authority. Those facts, when construed in the light most favorable to King (as they must be in a motion for summary judgment), constitute a seizure within the meaning of the Fourth Amendment.

The Eighth Circuit did not find that this was a Fourth Amendment case but did analyze this under the Fourteenth Amendment. The Eighth Circuit analysis was flawed for not analyzing under the Fourth Amendment because:

> Where a particular amendment provides an explicit textural source of constitutional protection against a particular sort of government behavior, that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.

County of Sacramento v. Lewis, __ U.S. __, 140 L.Ed.2d 1045, 1055 (1998). A seizure occurs only

when there is governmental termination of freedom of movement through means intentionally applied. *Lewis,* 140 L.Ed.2d at 1056. In this case, Beavers intentionally removed King from his bed in his pajamas and took him to California. That constitutes a seizure under the Fourth Amendment. However, even under the Fourteenth Amendment analysis, there is a deprivation of a federal constitutional right.

The term "due process" under the Fourteenth Amendment was meant to secure individuals from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Lewis,* 140 L.Ed.2d at 1057 (citing *Hurtado v. California,* 110 U.S. 516, 527, 4 S.Ct. 111, 28 L.Ed.232 (1884)). The touchstone of "due process" is protection of the individual against arbitrary action of the government, whether the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective. *Lewis,* 140 L.Ed.2d at 1057. The "due process" clause was intended to prevent government officials from abusing their power or employing it as an instrument of oppression. *Id.* This Court has held that the cognizable level of executive abuse of power is that which "shocks the conscience." *Lewis,* 140 L.Ed.2d at 1057. For example, the forced pumping of a suspect's stomach "shocked the conscience" and violated the decencies of civilized conduct. *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

In this case, Beavers has arbitrarily removed King from his home against his will. There was no court order authorizing Beavers to take any action. The Eighth Circuit held that what King was actually pleading was that there was a Fourteenth Amendment requirement that Beavers obtain a second court order. *See, King v. Beavers,* 148 F.3d 1031, 1034 (1998). The Eighth Circuit has misconstrued the allegations. That sort of analysis is best applied in deciding whether or not Beavers acted as a reasonable officer would have.

The Eighth Circuit opinion has combined the two analyses of what constitutional right is at stake and what a reasonable officer would do. The Eighth Circuit has essentially held that whether or not there is a Fourteenth Amendment right depends on what a reasonable officer would have done. *See, King,* 148 F.3d at 1034. The Eighth Circuit held that, since a reasonable officer would not have waited for a second court order, then there is no Fourteenth Amendment right at stake. *See, id.* at 1034-35.

That is not the correct analysis under the Fourteenth Amendment. As this Court recently stated, the first step is to identify the exact contours of the underlying right said to have been violated. *Lewis,* 140 L.Ed.2d at 1054, n. 5. The right which must be defined is whether or not a person may not be removed from his home against his will by a deputy sheriff under the authority of a guardianship order that is invalid and on its face does not direct the deputy sheriff to act. Removing someone from his home against his will and with-

out any authority is certainly arbitrary and oppressive. The Eighth Circuit makes much of the fact that below Petitioner did not fully argue his claims under the Fourth and Fourteenth Amendments. However, Beavers never raised those issues below, and King did not need to respond. Respondent's motion for summary judgment at the district court was based solely on the fact that he had acted reasonably under a qualified-immunity analysis.

The Johnson County Probate Court's order was invalid because many of the Arkansas statutes regarding guardianships were violated. King's rights under the Fourth and Fourteenth Amendments were violated, and the Eighth Circuit has erred in holding that the Fourth Amendment did not apply and that King's Fourteenth Amendment rights were not violated.

II. This case is also important because a state actor should not be given qualified immunity when he unreasonably removes someone from his home and then takes him out of his jurisdiction and then out of the state.

Government officials performing discretionary functions generally are shielded from liability for civil damages only if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396, 410 (1982). Whether an official may be personally held liable

for an allegedly unlawful official action turns on the objective legal reasonableness of the action taken. *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Following the advice of counsel does not automatically cloak an official with qualified immunity. *E-Z Mart Stores v. Kirksey,* 885 F.2d 476, 478 (8th Cir. 1989). In *Hurlman v. Rice,* qualified immunity was not given to state troopers who entered a home and removed a child based on an order from a family court which temporarily restrained the minor child from living with his grandfather. 927 F.2d at 80-82. The Second Circuit held that the state troopers could not have objectively viewed the family court's order as giving them blanket permission to enter the grandfather's house to retrieve a child and deliver custody to the father. *Hurlman,* 927 F.2d at 80. Just as the order in *Hurlman* did not direct the officers to take any action, the guardianship order and letters in this case did not direct Beavers to take any action.

An expert has also opined that no reasonable officer would have taken King out of his home and to California without a court order. The expert testified that all reasonable sheriff's deputies know that they are only empowered to enforce their law in their county. (88-A). No reasonable officer would have physically removed a ward from his home and taken him out of his county, much less out of the state, without a specific court order giving him permission. (88-A, 89-A). According to the expert witness, such conduct is not even arguably reasonable. (789-A). Below, Beavers argued that he was acting in his individual or "off-duty"

capacity. However, under clearly established Arkansas case law, an off-duty police officer can still make arrests, even when he is acting under the direction of a private employer. *Myers v. State,* 253 Ark. 38, 484 S.W.2d 334 (1972). In Arkansas, a law-enforcement officer is on duty 24 hours a day, seven days a week. *Id. Myers* had been the law for 23 years prior to this incident, and thus, Beavers should have known that he could not say he was "off duty" and carry King out of his home without proper authority. In any event, qualified immunity does not protect public defendants who claim they have acted as private citizens rather than as public officials. *Rambo v. Dailey,* 68 F.3d 203, 206 (7th Cir. 1995).

Beavers cannot rely on the advice of counsel to show that he acted reasonably in this case. Relying on erroneous opinions from a city attorney and a local judge does not automatically cloak an officer with qualified immunity. *E-Z Mart Stores v. Kirksey,* 885 F.2d 476, 478 (8th Cir. 1987). Reliance on counsel is only used to show the reasonableness of the officer's actions. *Id.* In this case, it was unreasonable for Beavers to rely on Bruce Wilson, the county attorney, because Wilson was also the attorney for Marilyn Johnson. Thus, it would have been suspect for Beavers to rely on the advice of Bruce Wilson, who could not give him impartial advice on how to proceed. Beavers also states that he was given the same advice by Sheriff Nicklas, but Sheriff Nicklas never inspected the guardianship order or letters. Furthermore, both Wilson and Nicklas ignored the Arkansas statutes which state that a deputy sheriff only has author-

ity to act within his county. *See,* Ark. Code Ann. §§14-15-503 and 505.

The Eighth Circuit in its opinion below cited Ark. Code Ann. §14-52-203 in support of its holding that Beavers needed qualified immunity because of his broad range of authority. *King,* 148 F.3d at 1036 (10-A).However, the statute cited by the Eighth Circuit refers only to city police officers, not to deputy sheriffs. *See,* Ark. Code Ann. 14-52-203. Furthermore, the Eighth Circuit dismissed Petitioner's expert because, in its view, the expert's testimony did not have anything to do with whether the trip violated King's clearly established constitutional rights. *See, King,* 148 F.3d at 1036 (9-A). That argument seems to miss the point. As argued above, King did have a clearly established federal constitutional right at stake, and the expert was opining on whether or not Beavers' actions were reasonable, not on whether a federal constitutional right was at stake.

For example, in a typical child-visitation case, if a deputy sheriff is asked to enforce an order, he would not take any action until one of the parties produced a writ of assistance. The writ of assistance would command the officer to enforce the order. In other words, simply an order granting visitation rights to one parent would not be sufficient for an officer to go and actually seize the child to give the parent his or her visitation. Similarly, in this case, where an adult without knowledge of any guardianship proceeding is being removed from his home against his will, a writ of as-

sistance or something similar should be required as well.

The Eighth Circuit held that Beavers was "duty bound" to help enforce the order and that, in this situation, he needed to take quick and decisive action. *King,* 148 F.3d at 1036. However, in this case, Beavers spent several minutes trying to talk King into leaving on his own and several minutes speaking with Bruce Wilson and Sheriff Nicklas. King was simply refusing to get out of his bed. There have been no allegations that he took any positive steps to harm anyone. It seems that the only time trouble began was when Beavers tried to remove King from his home. The trauma in this case is that King was told that he would have to leave his home and move halfway across the country without any warning whatsoever. There seems to be little reason to support the notion that King had to be taken to California on that day, other than Johnson's own convenience.

Even though Johnson was from California, there was not a requirement that King go with her back to California. The guardianship statutes provide for the appointment of an agent in the state to receive service. *See,* Ark. Code Ann. §28-65-203(e). Thus, it was contemplated that a guardian might reside out of state whereas the ward would reside in the state.

The breach of peace in this case was caused when Johnson attempted to remove King from his home. The peace was hardly kept when Beavers physically removed King from his bed, out of his

home and into a patrol car, putting King behind the partition as he would a criminal. Beavers had more than sufficient time to think through his actions while he was at King's home and on the drive from Clarksville to Little Rock, approximately one and one-half hours. It never occurred to him to stop. In fact he knew what he was doing and intentionally pursued a course to take King out of the state because he had been promised by Johnson that he would be paid for his time. If the Eighth Circuit holding is allowed to stand, this will only encourage private individuals like Johnson to associate and conspire with public officials such as Beavers to settle their differences. *See, Furrell v. Board of Trustees of Georgia Military College,* 970 F.2d 785, 796 (11th Cir. 1992). Thus, the Eighth Circuit has erred in granting Beavers qualified immunity.

III. The Eighth Circuit has changed the standard for pretrial motions for qualified immunity by accepting as true the facts alleged by the Respondent, not the Petitioner, as it was required to do.

The Court below held that to review the denial of a pretrial qualified immunity motion, it accepts as true the facts alleged by the nonmoving party. *See, King v. Beavers,* 148 F.3d 1031, 1032 (8th Cir. 1998) (citing *Jackson v. Everett,* 140 F.3d 1149, 1151 (8th Cir. 1998)). However, the Eighth Circuit found every fact in a light most favorable to the moving party, Beavers. The court found that King had notice, which he denied. *King,* 148 F.3d at 1032-33. It found that King walked to the patrol

car, when he did not. *Id.* at 1033. Furthermore, King offered affidavits from his brother and sister disputing the alleged "deplorable conditions." All of these facts were significant in that they affect his claim that he was deprived of a federal constitutional right and whether or not Beavers acted reasonably as he is qualified to do under a qualified-immunity analysis. However, the Court of Appeals viewed the facts in a light most favorable to Beavers.

Summary judgment is granted only when there are not genuine issues of fact. Fed. R. Civ. P. 56(c); *Celotex v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548 (1986). A court must view the facts and inferences drawn from those facts in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). The court below did not follow these rules and instead found the facts in favor of the moving party. This change in the law would make it impossible for any person to bring a claim under 42 U.S.C.A. §1983 against any government official.

CONCLUSION

For the reasons stated, the writ of certiorari should issue to the Petitioner.

Respectfully submitted,

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(2)

Supreme Court, U.S.
FILED
OCT 6 1998
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No. 98 592

IN THE

Supreme Court of the United States

October Term, 1998

Wayne King,

Petitioner,

v.

Charles Beavers,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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90 pp

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, No. 97-3295WAFS. Wayne King, Appellee v. Charles Beavers, Appellant. Appeal from the United States District Court for the Western District of Arkansas.

Judgment

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this case is reversed in accordance with the opinion of this court.

July 9, 1998

Michael E. Gans, Clerk
U. S. Court of Appeals
Eighth Circuit

OPINION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, No. 97-3295. Wayne King, Plaintiff-Appellee v. Charles Beavers, Defendant-Appellant. Appeal from the United States District Court for the Western District of Arkansas. Submitted February 13, 1998. Filed July 9, 1998.

Before LOKEN and HANSEN, Circuit Judges, and DAVIS,* District Judge.

LOKEN, Circuit Judge.

Wayne King filed this 42 U.S.C. §1983 action against Deputy Sheriff Charles Beavers, alleging that Beavers violated King's Fourteenth Amendment right to liberty in enforcing a guardianship order. Beavers appeals the district court's denial of his motion for summary judgment on qualified immunity grounds. We reverse.

I.

To review the denial of a pretrial qualified immunity motion, we accept as true the facts alleged by King, the non-moving party. *See, Jackson v. Everett,* 140 F.3d 1149, 1151 (8th Cir. 1998). In November 1995, Wayne King was seventy-seven years old. He lived with his invalid wife, Bonnie,

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* The HONORABLE MICHAEL J. DAVIS, United States District Judge for the District of Minnesota, sitting by designation.

who could not walk or talk and required constant care. Betty Tudor, an Arkansas Department of Human Services Consultant, became concerned by King's refusal to admit home health care aides. She visited the Kings' home and found them living in what she considered deplorable conditions.[1] Before recommending that the State of Arkansas petition for custody of Mr. and Mrs. King, Tudor contacted their only daughter, Marilyn Johnson, a California resident.

Johnson came from California and began staying with the Kings on November 10. On November 17, at Tudor's urging, Johnson sought the advice of an attorney and petitioned the Johnson County Probate Court for her appointment as guardian of the persons and estates of Mr. and Mrs. King. The petition was supported by a letter from Clarksville physician Jack T. Patterson stating that King was "probably significantly depressed and perhaps is a threat to both himself and to his wife." On November 21, after notice to King (which he claims he did not receive), the court held a hearing and issued an order finding that Wayne and Bonnie King were incapacitated, appointing Marilyn Johnson guardian of their persons and estates, and directing the Clerk of Court

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[1] Tudor made two trips to the Kings' home in early November 1995. In a July 1997 affidavit, Tudor averred that the Kings spent most of the day sleeping, King fed his wife mostly cereal, Mrs. King was incontinent and the bedroom reeked of urine, Mr. King seemed upset by visitors, and Mrs. King seemed confused and in poor health. The Department of Health stopped home health services on November 7 because King would not admit health aides to care for his wife. King does not dispute these averrals.

to issue Letters of Guardianship to Marilyn Johnson of Paicines, California. Johnson then filed a guardian's bond, and the Clerk issued Letters of Guardianship reciting that Johnson was "authorized to have the care and custody of and to exercise control over the person and take possession and administer the property of [Wayne and Bonnie King] as authorized by law."

On November 29, Johnson County Sheriff Charles Nicklas received a call from the King residence advising that Betty Tudor was having problems because Mr. King would not obey the court order appointing Marilyn Johnson guardian. Sheriff Nicklas sent Deputy Beavers to the King residence to assist Tudor. Beavers arrived and reviewed the guardianship order and Letters of Guardianship. He discussed the matter with Tudor, Johnson, and home health care workers and then tried to persuade Mr. King to get out of his bed. When King refused, Beavers contacted Johnson County Attorney Bruce Wilson, who said Beavers should try to persuade King to go with his daughter to California.[2] Beavers returned to King and tried to persuade him to leave with Johnson. King refused, repeatedly stating, "I will kill myself," and saying he hoped his wife would die as well. Beavers again contacted Wilson, who advised that Beavers should physically remove King from the home if necessary. After a final unsuccessful

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[2] Unbeknownst to Beavers, Wilson was also the private attorney representing Marilyn Johnson in the guardianship proceeding. While this apparent conflict of interest is disturbing, it does not affect Beavers's claim to qualified immunity.

attempt at persuasion, Beavers picked King up and carried him to the front door. At that point, King said: "Put me down. I will walk. What are the neighbors going to think?" King walked to the patrol car and rode to a nearby medical clinic, where Johnson arranged for him to receive a shot.

At the clinic, Johnson told Beavers she needed assistance getting the Kings to the Little Rock airport and then to California. Beavers called Sheriff Nicklas, who said Beavers could take King to Little Rock and could accompany Johnson and the Kings to California if there was no expense to Johnson County. Beavers then called County Attorney Wilson, who said he saw no problem with these proposed actions. Beavers drove the group to the Little Rock airport and then accompanied Johnson and the Kings on their plane ride to California. The travel took place without incident. Johnson paid for Beavers's plane ticket and paid him $430 for assisting her on the trip to California. Beavers took the next flight back to Arkansas.

In February 1996, Johnson voluntarily terminated Mr. King's Arkansas guardianship and California temporary conservatorship after an investigator concluded that King was able to care for himself. In March, King returned to Arkansas, and Mrs. King died shortly thereafter. An embittered King filed this action in November 1996 against his daughter and Beavers. The district court denied Beavers's motion for summary judgment on qualified immunity grounds, explaining:

> Had Beavers merely assisted Johnson, who had a court order and letters of guardianship giving her cus-

> tody and control over both her father and his possessions, with removing King from the home, our conclusion would undoubtedly be different. Additionally, our conclusion might be different had Beavers, in reliance on the advice of the prosecuting attorney and the sheriff, merely assisted in transporting King to the airport at Johnson's request. However, here Beavers went farther—he went outside not only the county in which he had authority or jurisdiction to act but went outside the state. . . . We agree with King that these acts were not objectively reasonable.

Beavers appeals. We have interlocutory jurisdiction to consider issues of law raised by the denial of a pretrial qualified immunity motion. *See Murphy v. State of Ark.*, 127 F.3d 750, 753 (8th Cir. 1997). We review the denial of qualified immunity *de novo*.

II.

Qualified immunity protects government officials from damage liability unless their discretionary acts violated clearly established statutory or constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1992). Qualified immunity guards against the injustice of subjecting public officials to damage liability for the good faith performance of discretionary duties they are legally

obligated to undertake, and the danger that the threat of such liability will deter officials from performing with the decisiveness and judgment the public good requires. *See Scheuer v. Rhoades*, 416 U.S. 232, 241-42 (1974). Qualified immunity protects all but the plainly incompetent and those who willingly violate the law. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986). We conclude Beavers is entitled to qualified immunity for two distinct reasons.

No Clearly Established Federal Right. To recover under 42 U.S.C. §1983, King must prove that Beavers violated King's constitutional rights while acting under the color of state law. To avoid a claim of qualified immunity, the right alleged must be "clearly established," that is, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). When qualified immunity is asserted in a §1983 action, we "determine first whether the plaintiff has alleged a deprivation of a constitutional right at all," and if so, "whether the right allegedly implicated was clearly established at the time of the events in question." *County of Sacramento v. Lewis*, 118 S.Ct. 1708, 1714, n. 5 (1998). King's claim founders on these issues, which the district court barely discussed in its otherwise lengthy opinion.

King argues that Beavers "falsely imprisoned [King], denying him his constitutional right to liberty." False imprisonment is a state-law tort claim. It is not coextensive with the Fourteenth Amendment, which "protects only against deprivations of

liberty accomplished 'without due process of law.'" *Baker v. McCollan*, 443 U.S. 137, 145 (1979). For example, the constitutional right to liberty is not violated if the State takes custody of a citizen following a judicial determination that he is unable to care for himself or is a serious risk to the safety of himself and others. *Compare O'Connor v. Donaldson*, 422 U.S. 563 (1975), with *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Here, the Johnson County Probate Court's guardianship order was of a similar nature, except that it ordered King into the custody of a private guardian, his daughter Marilyn Johnson. King does not, and in our view could not, argue that enforcement of the guardianship order violated his substantive due-process right to liberty.[3]

Instead, King argues that "no objectively reasonable officer would have believed that the guardianship order and Letters of Guardianship gave him authority to remove the ward to California." In other words, King's entire claim is based upon the proposition that the Fourteenth Amend-

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[3] Nor does King argue the order violated his right to procedural due process; in any event, such a claim would not give rise to a cause of action against Beavers. King's complaint did generally plead violations of the First, Fourth and Fifth amendments, but he has not argued those claims on appeal. *Cf. Sellers v. Baer*, 28 F.3d 895, 898 n.4 (8th Cir. 1994), *cert. denied*, 513 U.S. 1084 (1995). Because Beavers physically seized King in his home, it is likely that "any liability must turn on an application of the reasonableness standard governing searches and seizures." *County of Sacramento*, 118 S.Ct. at 1715. However, analysis of this case under the Fourth Amendment would not lead us to a different conclusion.

ment required a *second* court order before guardian Johnson, with the assistance of such state actors as DHS Consultant Tudor, County Attorney Wilson, Sheriff Nicklas, and Deputy Beavers, could move the unwilling King from his home to his legal guardian's place of residence. Of course, the proper scope and import of the probate court's guardianship order and Letters of Guardianship are questions of state law. Yet neither King nor the district court cited Arkansas authority supporting King's contention, nor attempted to explain why any such violation of state law would amount to a federal constitutional deprivation.

There is apparently no Arkansas case law on the question whether a facially unlimited guardianship order grants the guardian the power to change an unwilling ward's place of residence, and more particularly, to move the ward out of state. The few cases we have found from other states tend to contradict King's position:

> In this country the decisions uniformly hold the guardian may change the residence of the ward, whether infant or lunatic, to another state, if this be done in good faith and for the best interest of his ward, especially when with the consent or approval of the court appointing the guardian.

In re Waite, 180 N.W. 159, 161 (Iowa 1920); *see generally* 39 C.J.S. *Guardian & Ward* §60 (1976).

Nor does a review of the pertinent Arkansas statutes lend support to King's contention. The

guardian is "entitled to the custody of the ward." Ark. Code Ann. 28-65-301(a)(3). If the court decides that the guardian's powers should be limited, it "shall set forth the specific powers, authorities, and duties the guardian shall possess," §28-65-214(d); here Johnson's guardianship order conferred unlimited custodial powers. Changing the ward's residence is not among a statutory list of guardian decisions that always require prior court approval. *See* §28-65-302. But one of the grounds for terminating an Arkansas guardianship is "[i]f the ward becomes a nonresident of this state," §28-65-401(b)(2)—express legislative recognition that guardians may effect a change of residence. Finally, in this case, the guardianship order expressly recited that the guardian was a resident of California, a clear signal that the probate court knew a change of King's residence was implicit in appointing Johnson guardian.

In sum, King has no support for his assertion of a Fourteenth Amendment liberty deprivation. In denying Beavers qualified immunity, the district court relied on *Hurlman v. Rice*, 927 F.2d 74, 79-80 (2d Cir. 1991). But that was a Fourth Amendment decision premised upon the court's conclusion that an order to show cause directed to a child's *mother* in no way authorized police officers to seize the child from her *grandparents'* home. This case is very different. Based upon our review of the relevant Arkansas statutes, confirmed by what little case law there is elsewhere in the country, we conclude that the probate court's guardianship order implicitly included the power to change the ward's residence to that of the

guardian. Therefore, DHS Consultant Tudor, the County Attorney, the County Sheriff, and Deputy Beavers did not violate King's Fourteenth Amendment rights by helping to escort him, involuntarily but peacefully, to the guardian's residence in California without additional authorization from the probate court. Beavers is entitled to summary judgment dismissing this §1983 action because he did not violate King's constitutional rights by removing King from his home, escorting King to the Little Rock airport and accompanying King and Johnson to California.

B. Objectively Reasonable Conduct. Alternatively, we conclude that Beavers's conduct was objectively reasonable, that is, it "did not violate clearly established rights of which a reasonable person would have known." *Bagby v. Brondhaver,* 98 F.3d 1096, 1098 (8th Cir. 1996).[4] Beavers went to the King home at the direction of Sheriff Nicklas to assist DHS Consultant Tudor. He reviewed a court order and Letters of Guardianship placing King in Johnson's custody and control. He was advised by Tudor that King should accompany Johnson to California. When King resisted, threatening to kill himself, Beavers consulted the County Attorney and later the Sheriff and acted

[4] There is some support in our prior cases for the proposition that Beavers is entitled to quasi-judicial absolute immunity because he was carrying out a facially valid court order. *See Robinson v. Freeze,* 15 F.3d 107, 109 (8th Cir. 1994); *Patterson v. Von Riesen,* 999 F.2d 1235, 1239 (8th Cir. 1993); *Tymiak v. Omodt,* 676 F.2d 306, 308 (8th Cir. 1982). However, qualified immunity is the norm. The absolute immunity issue has not been raised, and we do not consider it.

consistently with their advice. He used minimal force in assisting King's daughter and legal guardian to move King and his invalid wife to the daughter's home. While King's law-enforcement expert opined that it was unreasonable for Beavers to travel far outside his jurisdiction in assisting Johnson, that issue has nothing to do with whether the trip violated King's clearly established constitutional rights.

Given the traumatic situation Beavers encountered, the instructions from his superiors, and his wide-ranging responsibilities as an Arkansas law enforcement officer, *see* Ark. Code Ann. §14-52-203, Beavers undoubtedly would have been remiss—and would have faced uncertain liability—had he arrived at the King residence and failed to take reasonable action to pacify the feuding family members. Some months later, Mr. King's custodial guardianship proved to be unnecessary and was terminated. But the guardianship order was facially valid. Beavers was duty bound to help enforce that order, and his actions in that regard were objectively reasonable because they were consistent with the court's grant of full guardianship to Marilyn Johnson. Public officials facing situations like this must take quick and decisive action to mitigate risks to health and safety. This is precisely the kind of good faith discretionary official action that qualified immunity is intended to protect. *Compare Miller v. Compton*, 122 F.3d 1094, 1099 (8th Cir. 1997)

The order of the district court denying the motion of defendant Charles Beavers for summary judgment is reversed.

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION. Wayne King, Plaintiff v. Marilyn Johnson and Charles Beavers, Defendants. Civil No. 96-2219.

Order

On this 29th day of July, 1997, upon consideration of the motion for summary judgment filed by Charles Beavers, the court finds for the reasons stated in a memorandum opinion of even date that said motion should be and hereby is denied.

The order denying qualified immunity is, of course, appealable. Defendant Charles Beavers is advised to inform the court by the close of business on August 6, 1997, whether he intends to immediately appeal this order. If so, the court may desire to stay the case during the pendency of that appeal.

IT IS SO ORDERED.

H. FRANKLIN WATERS
United States District Judge

OPINION OF THE DISTRICT COURT JULY 29, 1997

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION. Wayne King, Plaintiff v. Marilyn Johnson and Charles Beavers, Defendants. Civil No. 96-2219.

Memorandum Opinion

This case is currently before the court on the motion for summary judgment filed by the separate defendant Charles Beavers. Wayne King filed this action on November 27, 1996 under the provisions of 42 U.S.C. §1983 contending that he was unlawfully deprived of his liberty or falsely imprisoned. King also asserts a state law claim of intentional infliction of emotional distress or outrage. The summary judgment motion does not address this latter claim.

Background.

Marilyn Johnson (Johnson) is the daughter of Wayne and Bonnie King. On November 17, 1995, Johnson filed a petition pursuant to Ark. Code Ann. §28-65-218 (Supp. 1995) for appointment as guardian of the person and estate of both her parents. At the time, Wayne King (King) was 77 years old (now 79) and Bonnie King was 78 years old. Both were in poor health. Bonnie King was apparently totally disabled and was unable to walk or talk.

In the petition, Johnson alleged that her parents were incapacitated by reason of age and unable to care for themselves and that she believed there was an eminent danger to the health of her parents. Johnson was represented by an attorney, Bruce Wilson (Wilson).

On November 20, 1995, notice was issued to both Wayne and Bonnie King that a hearing on the petition for guardianship would be held on November 21, 1995, at 9:00 a.m. Each notice bears a return which states it was served on the named person. King denies that the notices were served on either himself or his wife.

On November 21, 1995, Johnson presented to the court a letter from Dr. Jack T. Patterson which stated, among other things, that King was probably "significantly depressed and perhaps is a threat to both himself and to his wife." At the conclusion of the hearing, Johnson was appointed guardian of the person and estate of both her parents. Letters of guardianship were issued. The letters of guardianship provided that Johnson was "authorized to have the care and custody of and to exercise control over the person and take possession of and administer the property of" Wayne and Bonnie King. Neither the order or the letters of guardianship make any reference to the removal of the Kings from Arkansas to California. Similarly, neither contained any prohibition against the same and they contained no restrictions on Johnson's authority as guardian. On November 27,

1995, an inventory of the estate was filed with the probate court.

Charles Beavers (Beavers) is a deputy with the Johnson County Sheriff's Department. He has been so employed for about five years.

On November 29, 1995, Beavers was notified by Johnson County Sheriff, Charles Nicklas, that Betty Tudor of Adult Protection was at the Kings' residence in Clarksville, Arkansas, and was having problems with a guardianship case involving King. King was refusing to go with his daughter, Johnson, to California.

Beavers was directed to go to the home and see if he could assist Tudor. When Beavers arrived, Tudor, Johnson, and some home health care workers were already present. Beavers was shown the order appointing Johnson guardian of King. After reviewing the court order, the letters of guardianship, and discussing the matter with those present, Beavers went into the bedroom where King was apparently refusing to get out of bed.

Beavers tried to talk King into getting out of bed and getting dressed. According to Beavers, King kept saying "I will kill myself." When asked who would care for his wife then, King allegedly said he hoped she would die.

Beavers states he contacted by telephone Wilson,[1] the Johnson County Prosecuting Attorney, told him about the incident and informed him that King was refusing to go with Johnson. Wilson replied that King had to go with his daughter and that Beavers should talk him into going. There has been no evidence presented that indicates Beavers was aware that Wilson was also acting as Johnson's attorney.

Beavers returned to the bedroom and discussed with King the proposed trip to California. After ten or fifteen minutes, Beavers contends he called Wilson again and told him that King was not going to go without being physically removed. Wilson told Beavers to go ahead and physically remove King if that was the only way King would go.

Beavers again tried to talk King into going. When King refused, Beavers bent over and picked King up. Beavers placed one arm under King's legs and the other behind his back. Beavers carried King to the front door. According to Beavers, once at the front door King said: "Put me down. I will walk. What are the neighbors going to think?" Beavers put King down and King walked outside to the patrol car and got inside.

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[1] King by affidavit states that at "no time while he was in my house did Beavers use my phone." No further information is given about the location of the phone, etc. King does not deny that he was in bed and refused to leave the bedroom, nor does he make any assertions regarding his ability to see or hear Beavers at the relevant times.

Beavers was informed that Johnson had called a doctor at the Clarksville Medical Group and had set up an appointment for King to receive a shot of some type. Beavers took King to the medical facility, parked, and a nurse came to the car and administered a shot.

Johnson informed Beavers that she needed assistance in getting King to the airport in Little Rock, Arkansas. Beavers contacted Sheriff Nicklas[2] to find out if he was to take King to Little Rock in his patrol car. Beavers was advised that he could assist Johnson in taking King to Little Rock and if he wanted to, he could assist her to California as long as there was no expense to Johnson County. Beavers also contacted Wilson who indicated he could see no problem in providing Johnson assistance.[3]

Johnson paid for Beavers' round trip airline ticket to California. Johnson also paid Beavers for his services in assisting her to California.[4] Beavers contends he was not working as a Johnson County deputy sheriff during this time.

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[2] In his affidavit, King states that he "never saw Beavers radio anyone stating that he was taking me to Little Rock."

[3] Plaintiff offers as an exhibit a typed statement purportedly signed by Beavers dated December 12, 1996, in which Beavers indicates Wilson's reply to the inquiry was: "I do not foresee any problem in assisting Marilyn Johnson to Little Rock, Arkansas."

[4] Beavers states he was paid approximately $10 an hour. King states Beavers was paid $430.

Beavers states that on the way to the airport he and King talked about King's past. During the airline trip Beavers states that King spoke of killing himself and of killing everyone in his daughter's house. Beavers advised Johnson of these threats.

King also talked about his past, his mother, and his brother. Although King initially refused or declined to eat he later did agree to eat something. In Beavers' opinion, King did not seem to be able to deal with what was going on in his life and appeared to be at the end of his rope and unable to deal with the reality of the care of his wife. Beavers states he used no force to get King to comply with reasonable requests and only accompanied Johnson and the Kings in order to assure King's safety and to assist Johnson.

Once in California, Johnson filed a petition for appointment as conservator for King. Subsequently, at a hearing held in California on January 23, 1996, "[b]ased upon the report of the court investigator, [Johnson] withdrew her petition to establish the conservatorship" and "stipulated on the record that she "would be withdrawing the similar action as to the proposed conservatee in the State of Arkansas." The temporary conservatorship was dissolved as to both the estate and the person of King.

Beavers has now moved for summary judgment. Beavers argues he is entitled to qualified immunity. He asks the court to consider the following: (1) he was acting pursuant to the court or-

der and letters of guardianship which specifically gave Johnson authority to have custody of and exercise control over King; (2) he obtained permission from the Sheriff and the Prosecuting Attorney to assist Johnson by accompanying her to California; and (3) King's actions in refusing to go with his guardian, his threats of suicide, etc., gave Beavers "arguable probable cause" for the escort. In his affidavit, Beavers asserts that he was not acting under color of state law during the transportation of the Kings to California.

King denies that Beavers is entitled to qualified immunity and contends that Beavers did not act as an objective officer would have in enforcing the court order. As a result, King contends he was deprived of "his constitutional right to be free from false imprisonment." He contends it was obvious that from the time in the house when Beavers physically picked him up that he could not refuse to go to Little Rock, get on the plane, and go to California.

Specifically, King argues that no reasonably objective law enforcement officer would have (1) believed he could enforce an order outside of the county in which he works; or (2) interpreted an order which only stated Johnson had custody of King to mean that he could detain King and take him anywhere directed by Johnson. King also contends Beavers was acting under color of state law in taking these actions. He points out that Beavers came to King's home to enforce the court order, transported him to the airport in a patrol car, and then escorted him to California. Accord-

ing to King, at no time during this transport did Beavers give any indication that he was not acting as a law enforcement officer.

By affidavit, King states that Beavers picked him up, injuring his side, and carried him from his bed to the back door of Beavers' unmarked patrol car. Along the way King states his back was bumped against a door facing causing injury to his back. King states he was taken from his home in his pajamas and not even given a chance to put on socks and shoes until he arrived at the Little Rock airport.

Discussion.

1. *"Color of State Law."*

In order to state a claim under 42 U.S.C. §1983, plaintiff must allege that the defendants acted under color of state law and that they violated a right secured by the Constitution. *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988). The deprivation must be intentional; mere negligence will not suffice to state a claim for deprivation of a constitutional right under §1983. *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 671 (1986).

Beavers contends that he was not acting under color of law while assisting in the transport of the Kings to California.[5] He has not developed

[5] This assertion that he was acting as a private citizen during the relevant time, is inconsistent with Beavers' assertion

his argument to an extent and the brief does not address this argument. Presumably he is contending that although he was acting under color of law when he went to the King home, he at some point during the continuous process became privately employed by Johnson and was thus off duty as far as Johnson County is concerned.

The inquiry is not this simple, even when an officer of off duty during the entire incident in question, more than his work status is at issue. *Rivera v. LaPorte,* 896 F.2d 691, 695-696 (2d Cir. 1990), *cert. denied,* __ U.S. __, 116 S.Ct. 515, 133 L.Ed.2d 423 (1995). In other words, the "color of law" inquiry, cannot be answered merely by ascertaining whether the officer in question was on or off duty when the challenged incident occurred.

In the case of *Martinez v. Colon,* 54 F.3d 980 (1st Cir. 1995) the court summarized the applicable analysis as follows:

> [T]he construct—"acting under color of state law"—rarely depends on any

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of a qualified immunity defense. *See e.g., Rambo v. Daley,* 68 F.3d 203, 206 (7th Cir. 1995) ("Because of its narrow policy considerations, qualified immunity, as articulated in *Harlow,* is not available for private defendants who have acted under color of law. Similarly, qualified immunity cannot protect public defendants, as in this case, who claim they have acted as 'private citizens' rather than 'public officials.' . . . Qualified immunity is simply unavailable to protect actions of government officials that are taken in their 'private' and not their 'official' capacity.' "), *cert. denied,* __ U.S. __, 116 S.Ct. 1546, 134 L.Ed.2d 649 (1996).

single, easily determinable fact, such as a policeman's garb, duty status, or whereabouts. Nor does "acting under color of state law" depend on whether an officer stays strictly within the line of duty or oversteps it. For instance, a police officer who exercises, but misuses or exceeds, his lawfully possessed authority is generally thought to be acting under color of state law.

The point is that segregating private action from state action calls for a more sophisticated analysis. In general, section 1983 is not implicated unless a state actor's conduct occurs in the course of performing an actual or apparent duty of his office, or unless the conduct is such that the actor could not have behaved in that way but for the authority of his office. Thus, whether a police officer is acting under color of state law turns on the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties.

We think this focus follows inexorably from *West*, where the Court wrote that "[t]he traditional definition of acting under color of state law requires that the defendant . . . have exercised power 'possessed by virtue of state law and made possible only

> because the wrongdoer is clothed with the authority of state law.'" Hence, a person acts under color of state law "when he abuses that position given to him by the State." The key determinant is whether the actor, at the time in question, purposes to act in an official capacity or to exercise official responsibilities pursuant to state law.
>
> Logically, then, not every action undertaken by a person who happens to be a police officer is attributable to the state. Though "under 'color' of law means under 'pretense' of law," even so, the acts of state officials "in the ambit of their personal pursuits" are not state action. Accordingly a policeman's private conduct, outside the line of duty and unaided by any indicia of actual or ostensible state authority, is not conduct occurring under color of state law. Even though "acting under color of law" includes "acting under pretense of law" for purposes of a state action analysis, there can be no pretense if the challenged conduct is not related in some meaningful way either to the officer's governmental status or to the performance of his duties.

Id. at 986-87 (citations omitted).

In this case Beavers was directed to the Kings' home by the Johnson County Sheriff. He was told to assist Johnson. By virtue of this direction and after further consultation with the sheriff and the prosecuting attorney, Beavers drove King to the Little Rock airport. King rode in the back seat of an unmarked patrol car behind the partition. Beavers continued to provide assistance and an escort to the State of California. Under these circumstances, we agree with the plaintiff that Beavers was acting under "color of state law."

2. *Qualified Immunity.*

"Government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant,* 502 U. S. 224, 112 S.Ct. 534, 537, 116 L.Ed.2d 589 (1991), quoting, *Malley v. Briggs,* 475 U.S. 335, 343, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). The inquiry is normally one of pure law. *J.H.H. v. O'Hara,* 878 F.2d 240 (8th Cir. 1989).

The doctrine of qualified immunity shields officials acting only in their individual capacities. *Brandon v. Holt,* 469 U.S. 464, 472-73, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985). *See also W. B. v.*

Matula, 67 F.3d 484, 499 (3d Cir. 1995). Any claims against the defendants in their official capacities may not be defended against on the basis of qualified immunity. *Id.*

Immunity is appropriate if the plaintiff does not allege violation of a clearly established constitutional or statutory right. *Latimore v. Widseth,* 7 F.3d 709, 712 (8th Cir. 1993).

> The mere assertion of such a right, however, will not be adequate: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Thus the defense still may be viable, even in the face of a clearly established (and violated) constitutional right, if the defendant can demonstrate "the 'objective legal reasonableness' of the action assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson,* 483 US. at 639. . . .

Latimore, 7 F.3d at 712. While a prior case need not address the precise factual situation facing the officials, the unlawfulness of their actions must be apparent in light of pre-existing law. *Anderson v. Creighton,* 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 423 (1987).

To withstand a motion for summary judgment on qualified immunity grounds, a civil rights plaintiff must (1) assert a violation of a constitutional right; (2) demonstrate that the alleged right is clearly established; and (3) raise a genuine issue of fact as to whether the official would have known that his alleged conduct would have violated plaintiff's clearly established right. *Habiger v. Fargo,* 80 F.3d 289 (8th Cir. 1996), *cert. denied,* __ U.S. __, 117 S.Ct. 518, 136 L.Ed.2d 407 (1996).

In this case, King contends he was deprived of his liberty when Beavers provided assistance to Johnson in removing King from his home and transporting him to the State of California. It is uncontested that Johnson had been appointed guardian of the person and estate of King by the Johnson County Probate Court.

In opposition to the claim of qualified immunity, plaintiff offers the court, *inter alia,* the affidavit of Warren Holcomb (Holcomb), a former deputy sheriff in Sebastian County, Arkansas Holcomb asserts that all reasonable law enforcement officers know: (1) they are always on-duty, even when employed by a private individual; and (2) they are only empowered to enforce the law in their county. He further asserts that "[n]o reasonable sheriff's deputy would have physically removed a ward from his home and taken him out of the county, much less out of the state without a specific court order which directed the county sheriff or his deputy to do so." Holcomb states "[i]t is not even arguably reason-

able that an objective sheriff's deputy would think that the . . . guardianship order . . . would allow him to remove a ward out of the state. Every objectively reasonable sheriff's deputy would need to have a specific order to take a ward out of state before doing so."

Plaintiff cites the court to the case of *Hurlman v. Rice,* 927 F.2d 74 (2d Cir. 1991). In that case New York State Police Troopers entered the home of George and Ruth Hurlman without consent and forcibly seized a minor child, Jillian Rice. The child was then delivered to the non-custodial father, Charles Rice, who was a New York police officer.

The troopers purported to be acting on authority granted by the family court. However, the family court's order merely temporarily enjoined the child's mother, Patricia Rice, from residing at her parents' home, George and Ruth Hurlman, with the minor child. The order did not contain any provision about the custody of the child or for the summary removal of the minor child from the home.

The noncustodial father allegedly was concerned about his daughter's welfare because George Hurlman had been convicted of an offense involving endangering the welfare of a child and had been given a probationary sentence that included a prohibition against Hurlman's having contact with his two other grandchildren. The troopers argued they were entitled to qualified immunity because (1) the family court order gave

them authority or (2) because Hurlman's past offense made that advisable. The court denied the request for qualified immunity noting that there [were] issues of fact that prevented the granting of summary judgment on this basis.

We agree with Beavers that the fact that he relied on the advice of the prosecuting attorney, Wilson,[6] and his superior officer, the sheriff, should be entitled to at least some weight in the qualified immunity analysis. It has been noted that "[w]hile reliance on the advice of counsel alone will not satisfy an official's burden of acting reasonably," it may nevertheless be used to show the reasonableness of the action taken. *Wentz v. Klecker,* 721 F.2d 244, 247 (8th Cir. 1983). *See also E-Z Mart Stores, Inc. v. Kirksey,* 885 F.2d 476, 478 (8th Cir. 1989).

The Tenth Circuit applies a four factor test in determining whether extraordinary circumstances exist in the context of reliance on counsel. In *Hollingsworth v. Hill,* 110 F.3d 733 (10th Cir. 1997) the Court noted that despite the existence of an inference that the defendant has violated a clearly established constitutional right of the plaintiff, a defendant may still be entitled to immunity "if he can demonstrate that "extraordinary circumstances" intervened and "so 'prevented [him] from knowing that his actions were unconstitutional that he should not be imputed

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[6] As we noted previously, there is no evidence in the record which shows Beavers was aware of the fact that Wilson was acting as Johnson's attorney in the guardianship matter.

with knowledge of an admittedly clearly established right.' " *Id.* at 740 (citations omitted).

It noted that this exception is frequently applicable in cases that involve reliance on counsel. *Id.* at 740-41. In deciding whether the exception in applicable in this context, the court considers the following factors: (1) "how unequivocal and specifically tailored to the particular facts giving rise to the controversy, the advice was;" (2) "whether complete information had been provided to the advising attorney(s);" (3) "the prominence and competence of the attorney(s);" and (4) "how soon after the advice was received the disputed action was taken." *Id.* at 741.

In this case, we must also consider the fact that the attorney from whom advice was sought was acting not only as a prosecuting attorney but as counsel for the party seeking assistance. We recognize, of course, that the record is devoid of any evidence regarding Beavers' knowledge of the "dual" role being played by Wilson.

The question here is whether Beavers' actions in physically removing a ward from his home at the request of his legal guardian and assisting the guardian in transporting the ward to her home in another state was objectively reasonable. We hold that it was not. Had Beavers merely assisted Johnson, who had a court order and letters of guardianship giving her custody and control over both her father and his possessions, with removing King from the home, our conclusion would undoubtedly be different. Ad-

ditionally, our conclusion might be different had Beavers, in reliance on the advice of the prosecuting attorney and the sheriff, merely assisted in transporting King to the airport at Johnson's request. However, here Beavers went farther—he went outside not only the county in which he had authority or jurisdiction to act but went outside the state.

Beavers got on an airplane bound for California and "assisted" in transporting King to California. We agree with King that these acts were not objectively reasonable. Therefore, we decline to grant him qualified immunity for these acts.

Conclusion.

For the reasons stated, a separate order in accordance herewith will be entered denying separate defendant Charles Beavers' motion for summary judgment on the issue of qualified immunity.

Dated: July 29, 1997

H. FRANKLIN WATERS
United States District Judge

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION. Wayne King, Plaintiff v. Marilyn Johnson and Charles Beavers, Defendants. Civil No. 96-2219.

Order

On this 1st day of May, 1998, upon consideration of the motion for summary judgment filed by Marilyn Johnson, the court finds for the reasons stated in a memorandum opinion of even date that said motion should be and hereby is granted. Accordingly, this action as against separate defendant Marilyn Johnson is hereby dismissed.

IT IS SO ORDERED.

H. FRANKLIN WATERS
United States District Judge

OPINION OF THE DISTRICT COURT MAY 1, 1998

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION. Wayne King, Plaintiff v. Marilyn Johnson and Charles Beavers, Defendants. Civil No. 96-2219.

Memorandum Opinion

This case is currently before the court on the motion for summary judgment filed by separate defendant Marilyn Johnson. By memorandum opinion and order entered on August 1, 1998, the court denied the motion for summary judgment filed by Charles Beavers. The ruling on the qualified immunity issue was immediately appealable and that portion of the case is on appeal to the Court of Appeals for the Eighth Circuit. The remainder of the case was stayed during the pendency of the appeal. Since that time Ms. Johnson has requested that the stay be lifted solely for purposes of the court deciding her motion for summary judgment. The court has lifted the stay for that purpose.

Background.

Marilyn Johnson (Johnson) is the daughter of Wayne and Bonnie King. Johnson lives in California. In early November of 1995, Johnson received a call from Betty Tudor (Tudor), an adult protective services consultant with the Arkansas Department of Human Services, informing her that her father and mother were having problems

caring for themselves and asking her to come to Arkansas as soon as possible. Tudor informed Johnson that Mr. King was not cooperating with home health care givers, was agitated and irrational, and that he was no longer capable of caring for himself and Mrs. King. Tudor suggested that Johnson seek guardianship of her parents.

Tudor became involved in the situation when on September 28, 1995, Adult Protective Services received a referral on Mrs. King. The referral indicated Mrs. King had been diagnosed with Alzheimer's and that her primary care giver was her husband, Wayne King. It was reported that Mr. King would often not let the home health nurses in to provide personal care services for Mrs. King. "The referral stated Mrs. King was incontinent, and would be soaked in urine when the home health aides would come in. Mr. King was also said to be in failing health and unable to care for his wife." *Tudor Affidavit* at p. 1.

Several trips were made to the home before Adult Protective Services and the Area Agency on Aging nurse could gain access to the house. Contact was made with the Kings on October 30, 1995. Tudor's account of the visit is as follows:

> After going into the house and calling, Mr. King did respond from the bedroom. I told him who we were and why we were there to check on them. He said to come on down the hall to their bedroom. We found Mr. and Mrs. King lying in bed, the drapes

were drawn with the room very dark. There was a strong odor of urine permeating the room. At first there was no response from Mrs. King, and I feared her physical condition would be poor. However, she did arouse and spoke to us. She appeared confused and unable to answer any of our questions. Mr. King had gotten up by that time, and was agitated with our presence. He said he took care of his wife and needed no outside assistance. He began getting her out of bed, telling her she needed to get up and get her bath. She seemed more confused as his agitation increased. There were medications in boxes all around the room. The nurse with Area Agency on Aging examined some of the medications; she stated she could not tell whether they were for Mrs. King or Mr. King. Some were marked and some were not. There were so many of them, it would be difficult to keep up with which medication to dispense and at what time.

Adult Protective Services consultant talked with Mr. King about relatives and how to reach them. He gave me his sister's name, Mrs. Pauline Buffington, and a phone number where she could be reached. He also gave me his daughter's name, Mrs. Marilyn Johnson, but could not find her tele-

> phone number. He did give the name of Mrs. Johnson's son with a telephone number. I contacted Mrs. Buffington as soon as possible, and she agreed to fly to Arkansas on November 6. I talked with the son of Marilyn Johnson, and he gave me the number to reach her. I called and gave her the information about her parents. She said she would also come as soon as arrangements could be made. In the interim, Adult Protective Services and Area Agency on Aging monitored the Kings.

Id. at p. 2.

On November 7, 1995, home health services by the Department of Health were dropped because of non-compliance by Mr. King. Specifically, the services were dropped because he would not honor the contract agreement and allow aides into the home to assist with Mrs. King's personal care. *Id.* On November 8, 1995, Tudor again went to the King residence and found the Kings in bed, Mrs. King soaked in urine, and Mr. King not feeling well. *Id.* at p. 3. Arrangements were made for a lady to come in the home and stay with the Kings for the evening and night of November 9, 1995. *Id.* Mr. King declined further services. *Id.*

Johnson arrived in Arkansas on November 10, 1995. *Johnson Affidavit* at ¶4. On November 11th, Tudor spoke with Johnson at length. *Tudor Affidavit* at p. 3. Tudor voiced her concerns about

Mr. King's possessive behavior and her concern for Mrs. King's well-being. *Id.* Johnson was advised to seek guardianship of her parents and to take them back to California with her. *Id.* at p. 4. In Tudor's assessment:

> Should Mrs. Marilyn Johnson not have petitioned the court for guardianship of her parents, the Department of Human Services, Adult Protective Services, would have petitioned for custody of Mrs. King and for a commitment order for her father. There was enough evidence of probable cause for the State of Arkansas to petition the courts for custody since Mrs. King fit the criteria of an endangered adult; not having mental capacity to know she was in danger. Mr. King was exhibiting behavior which could be interpreted as being a danger to himself and to his wife. In addition to the case of Mrs. Bonnie King, Adult Protective Services consultant felt Mr. King should also be turned in as a referral and another case number assigned to Mr. King. A case number was not assigned to Mr. King since guardianship was awarded to his daughter, Marilyn Johnson. His physical and mental health were being affected by his need to control the caregiving of his wife. Therefore, a psychiatric examination of Mr. King would have been requested by Adult

> Protective Services consultant. Mrs. King would have been placed in a supervised, skilled-care facility pending the outcome of Mr. King's psychiatric examination. Mr. King did not display the ability to make rational decisions about his wife or himself.

Id. at p. 4 & 5.

From November 10 to November 29, 1995, Johnson stayed with her parents at their home in Clarksville, Johnson County, Arkansas. *Johnson Affidavit* at ¶5. During her stay, Johnson states she observed "many instances when my father behaved irrationally and in a way that showed he was unable to properly care for himself and my mother. My mother was incontinent and my father was not changing her. On many days he would not get out of bed and did not want anyone to get my mother out of bed, consequently, they would both lie on a mattress and sheets soaked with urine." *Id.* at ¶6.

After talking with Tudor, who voiced an opinion that the Kings cold not continue to live independently and suggested Johnson seek guardianship, Johnson consulted a local attorney, Bruce Wilson, and discussed with him the problems her parents were experiencing. Wilson then contacted Tudor and Mary Kennedy, a registered nurse who had cared for Wayne King, and requested an evaluation and report from Dr. Jack Patterson. *Wilson Affidavit* at ¶3. On November 13, 1995, Mr. King was seen by Dr. Jack T. Patterson. Dr. Pat-

terson wrote Wilson a letter addressing Mr. King's problems. Among other things, Dr. Patterson states: "I do think that he's probably significantly depressed and perhaps is a threat to both himself and his wife."

After having completed his investigation, Wilson advised Johnson that he felt a guardianship was warranted. *Wilson Affidavit* at ¶4. With Wilson's assistance, on November 17, 1995, Johnson filed a petition pursuant to Ark. Code Ann. §28-65-218 (Supp. 1997) for appointment as guardian of the person and estate of both her parents. At the time, Wayne King was 77 years old and Bonnie King was 78 years old.

In the petition, Johnson alleged that her parents were incapacitated by reason of age and unable to care for themselves and that she believed there was an eminent danger to the health of her parents. On November 20, 1995, notice was issued to both Wayne and Bonnie King that a hearing on the petition for guardianship would be held on November 21, 1995 at 9:00 a.m. Each notice bears a return which states it was served on the named person. Mr. King denies that the notices were served on either himself or his wife.

On November 21, 1995, Johnson presented to the court the letter of Dr. Patterson. At the conclusion of the hearing, Johnson was appointed guardian of the person and estate of both her parents. Letters of guardianship were issued. The letters of guardianship provided that Johnson was "authorized to have the care and custody of and to

exercise control over the person and to take possession and administer the property" of Wayne and Bonnie King. Neither the order or the letters of guardianship make any reference to the removal of the Kings from Arkansas to California. Similarly, neither contained any prohibition against the same and they contained no restrictions on Johnson's authority as guardian. On November 27, 1995, an inventory of the estate was filed with the probate court.

Charles Beavers (Beavers) is a deputy with the Johnson County Sheriff's Department. He has been so employed for about five years. On November 29, 1995, Beavers was notified by Johnson County Sheriff, Charles Nicklas, that Tudor was at the Kings' residence in Clarksville, Arkansas, and was having problems with a guardianship case involving Mr. King. Mr. King was refusing to go with his daughter, Johnson, to California.

Beavers was directed to go to the home and see if he could assist Tudor. When Beavers arrived, Tudor, Johnson and some home health care workers were already present. Beavers was shown the order appointing Johnson guardian of Mr. King. After reviewing the court order, the letters of guardianship, and discussing the matter with those present, Beavers went into the bedroom where Mr. King was apparently refusing to get out of bed.

Beavers tried to talk Mr. King into getting out of bed and getting dressed. According to Beavers, Mr. King kept saying "I will kill myself."

When asked who would care for his wife then, Mr. King allegedly said he hoped she would die.

Beavers states he contacted by telephone Wilson,[1] the Johnson County Prosecuting Attorney, told him about the incident and informed him that Mr. King was refusing to go with Johnson. Wilson replied that Mr. King had to go with his daughter and that Beavers should talk him into going. There has been no evidence presented that indicates Beavers was aware that Wilson was also acting as Johnson's attorney.

Beavers returned to the bedroom and discussed with Mr. King the proposed trip to California. After ten or fifteen minutes, Beavers contends he called Wilson again and hold him that Mr. King was not going to go without being physically removed. Wilson told Beavers to go ahead and physically remove Mr. King if that was the only way Mr. King would go.

Beavers again tried to talk Mr. King into going. When Mr. King refused, Beavers bent over and picked Mr. King up. Beavers placed one arm under Mr. King's legs and the other behind his back. Beavers carried Mr. King to the front door. According to Beavers, once at the front door, Mr. King said, "Put me down. I will walk. What are the

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[1] Mr. King by affidavit states that at "no time while he was in my house did Beavers use my phone." No further information is given about the location of the phone, etc. Mr. King does not deny that he was in bed and refused to leave the bedroom, nor does he make any assertions regarding his ability to see or hear Beavers at the relevant times.

neighbors going to think?" Beavers put Mr. King down and Mr. King walked outside to the patrol car and got inside.

Beavers was informed that Johnson had called a doctor at the Clarksville Medical Group and had set up an appointment for Mr. King to receive a shot of some type. Beavers took Mr. King to the medical facility, parked, and a nurse came to the car and administered a shot.

Johnson informed Beavers that she needed assistance in getting Mr. King to the airport in Little Rock, Arkansas. Beavers contacted Sheriff Nicklas[2] to find out if he was to take Mr. King to Little Rock in his patrol car. Beavers was advised that he could assist Johnson in taking Mr. King to Little Rock and if he wanted to, he could assist her to California as long as there was no expense to Johnson County. Beavers also contacted Wilson who indicated he could see no problem in providing Johnson assistance.[3]

Johnson paid for Beavers' round trip airline ticket to California. Johnson also paid Beavers for his services in assisting her to California. Both Johnson and Beavers state he was paid $10 per

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[2] In his affidavit, Mr. King states that he "never saw Beavers radio anyone stating that he was taking me to Little Rock."

[3] Plaintiff offers as an exhibit a typed statement purportedly signed by Beavers dated December 12, 1996, in which Beavers indicates Wilson's reply to the inquiry was: "I do not foresee any problem in assisting Marilyn Johnson to Little Rock, Arkansas."

hour for accompanying Johnson and the Kings to California.

Beavers states that on the way to the airport he and Mr. King talked about Mr. King's past. During the airline trip Beavers states that Mr. King spoke of killing himself and killing everyone in his daughter's house. Beavers advised Johnson of those threats.

Mr. King also talked about his past, his mother and his brother. Although Mr. King initially refused or declined to eat, he later did agree to eat something. In Beavers' opinion, Mr. King did not seem to be able to deal with what was going on in his life and appeared to be at the end of his rope and unable to deal with the reality of the care of his wife. Beavers states he used no force to get Mr. King to comply with reasonable requests and only accompanied Johnson and the Kings in order to assure Mr. King's safety and to assist Johnson.

Once in California, Johnson filed on December 13, 1995, a petition for appointment as conservator for Mr. King. She hired various individuals to stay with Mr. King. One such individual was Lisa Morello. By affidavit, Morello states she worked for Johnson from January of 1996 until February of 1996. Morello describes Johnson's home as being located twenty miles from the nearest town. *Morello Affidavit* at ¶3. Morello states she was told Mr. King was a suicide threat and that she should always answer the phone and keep track of who called Mr. King and who he talked to. *Id.* at ¶4. Because the house was in a remote area

and Mr. King could not go out and talk to other people and because she was to track his movements and conversations, Morello felt Mr. King was a prisoner in the Johnson household. *Id.* at ¶5. Morello did not believe Mr. King was a suicide threat and believed he was perfectly capable of taking care of himself. *Id.* at ¶10. Mr. King would not speak to Johnson. *Id.* at ¶11.

Subsequently, at a hearing held in California on January 23, 1996, "[b]ased upon the report of the court investigator, [Johnson] withdrew her petition to establish the conservatorship" and stipulated on the record that she "would be withdrawing the similar action as to the proposed conservatee in the State of Arkansas." The investigator's report provides in part as follows:

> Wayne King was at all times perfectly and wonderfully rational and informative. Mr. Wayne King is clearly a man with strong opinions and great ability to think and act in his own best interests. Mr. Wayne King maintains that he has cared for his wife for over forty (40) years and should be allowed to continue caring for her and making decisions regarding her well-being. Mr. Wayne King exhibited no unusual signs of anger or depression other than one would feel after being removed from their own home and transported to another location against their will. Mr. King did not see his situation in Arkansas

as requiring the drastic measures that occurred.

The investigator represented to the court that Mr. King was "competent and able to care for himself and make decisions regarding his health and well-being." She also recommended that he be involved in decision making about his wife but concluded he was unable to provide twenty-four (24) hour a day physical care for his wife. The investigator recommended that either Adult Protective Services, or a person who Mr. King approves of, be the conservator for Mrs. King. With respect to Mrs. King, the investigator stated it was clear that she needed full-time care and that for twenty-four hour care to be available, there had to be more than one person involved.

The temporary conservatorship was dissolved as to both the estate and the person of Mr. King. Mr. King left Johnson's home on January 23, 1996, and Johnson has not exercised control over him since that date. Johnson states that she relied on her attorneys in Arkansas and California to handle the guardianship proceedings and followed their instructions with regard to her actions as guardian and with respect to guardianship funds. *Johnson Affidavit* at ¶12.

Mr. King has provided the court with the affidavit of his brother, Claud King. Claud King asserts that: (1) he visited his brother about once a month in the summer and fall of 1995 and the house was always in fine condition and Mrs. King was taken care of; (2) he did occasionally find his

brother in bed but this was because he had been up all night caring for Mrs. King; (3) his brother and Johnson "often seemed at odds;" (4) Johnson did not tell him or anyone else in the family that she was seeking guardianship of the Kings; (5) Wayne King called his mother, Lela King (94), on November 29, 1995, and told her the police were at his home and he and Mrs. King were being taken to California; (6) after this call, Claud went to Clarksville but was unable to locate his brother and was told the police and sheriff's office had no information about the Kings.

Plaintiff has also provided the court with the affidavit of Pauline Buffington, Wayne and Claud King's sister. Buffington states that she stayed at the Kings' home from July 17, 1995, to July 31, 1995, and the home and Mrs. King were being taken care of. Buffington states that when she was contacted by Tudor she agreed to go to Arkansas but before she could pick up her ticket Johnson's husband told her she did not need to go and that they "did not want war."

On June 4, 1996, Mr. King filed a petition for accounting in the Probate Court of Johnson County, Arkansas. In the petition, Mr. King alleges that the guardianship was accomplished as a result of misrepresentation and fraud, the legal requirements for obtaining it were not complied with, the guardianship was not conducted according to law, he was forcibly removed from his home against his will, and Johnson took in excess of $7,000 to which she was not entitled. On July 19, 1996, Johnson filed an accounting. Johnson

alleges the Probate Court has taken no action since the filing of the accounting.

On November 27, 1996, Mr. King filed this action against his daughter and Charles Beavers under §1983. 42 U.S.C. §1983. In addition to his civil rights claim, Mr. King asserts claims of outrage and false imprisonment under Arkansas law. Johnson has now moved for summary judgment on all claims. She contends that: (1) as a private individual she did not act under color of law and is not a state actor for purposes of §1983; (2) if she is found to have acted under color of law, she is entitled to qualified immunity or, in the alternative has a valid good faith defense; (3) the undisputed facts are insufficient to support a cause of action for outrage under Arkansas law; (4) the undisputed facts are insufficient so support a cause of action for false imprisonment under Arkansas law; and (5) Mr. King is collaterally estopped from bringing an action on the validity of the guardianship order since the issue has already been litigated in a state court proceeding. If the court grants the summary judgment motion on the §1983 claims but not on the state law claims, we are asked to decline to exercise supplemental jurisdiction over the state law claims.

Discussion.

1. §1983—Color of Law & State Action.

Johnson contends she is not subject to liability under §1983 because she is not a governmental employee and there was no state involve-

ment during the period of time in which the guardianship order was in effect. She contends that plaintiff's allegations refer only to the period of time in which the order was in effect. She contends that plaintiff's allegations refer only to the period of time in which the order was in effect and there are no allegations of any state action or action under color of state authority in connection with the procurement of the guardianship, or in connection with any of her activities which occurred after the guardianship was terminated. Further, she argues that any actions taken while the guardianship order were in place could not have deprived Mr. King of his constitutional rights since she was authorized by law to have the care and custody of and exercise control over him. She relies on cases such as *Orlando v. Witzel,* 443 F.Supp. 744 (W.D. Ark. 1978), *Colombrito v. Kelly,* 764 F.2d 122 (2d Cir. 1985), and *Taylor v. Gilmartin,* 686 F.2d 1346 (10th Cir. 1983) for the proposition that the appointment of a guardian and the assistance of Beavers does not constitute color of law or state action for purposes of §1983.

In opposition, Mr. King contends that a guardian is a state actor if the guardianship is a right or privilege created by the state and if the guardian receives significant aid from the state. Here, Mr. King argues those conditions are met, *i.e.,* the guardianship is a right or privileged created by the state and Johnson received significant aid from Beavers, Tudor and Wilson, who as deputy prosecutor, is also a state employee. He alleges that Johnson conspired with Tudor, Beavers, and Wilson to obtain the guardianship and that John-

son was, in a sense, doing the state's job by seeking the guardianship. He submits that there was more than a meeting of the minds, there was an exchange of cash between Johnson and Beavers. Mr. King relies heavily on *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir. 1986).

Mr. King also suggests that public policy requires Johnson to be held liable under §1983. Mr. King submits that once in California, Johnson began the process of spending down Mrs. King's estate so that she would qualify for Medicaid to pay for her nursing home care. He states that there is a need to prevent abuses or potential abuses in this regard. Mr. King asks the court to consider the procedures utilized in petitioning the Probate Court. He takes the position that Johnson was not properly appointed as guardian. He contends Johnson utilized the procedures for obtaining a temporary guardianship, which wouldn't exceed 90 days, but that the testimony necessary to establish there was an imminent danger to the life or health of the incapacitated person, or of loss, damage, or waste to the property of the incapacitated person was not presented and the order entered did not reflect that the guardianship was temporary. He argues Johnson had the judge sign a permanent guardianship order within the time limits for a temporary guardianship.

Under §1983, a plaintiff must prove that the conduct complained of was committed by a person acting under color of state law and that the conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of

the United States. *West v. Atkins,* 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988). "Section 1983 erects no shield against merely private conduct, however discriminatory or wrongful." *Holley v. Deal,* 948 F.Supp. 711, 714 (M.D. Tenn. 1996). Nevertheless under appropriate circumstances, a private individual may be said to be acting under color of state law. In analyzing a claim against a private actor the focus of the court's inquiry is whether the alleged deprivation of constitutional rights was committed under color of state law. "Action taken by private individuals may be 'under color of state law' where there is 'significant' state involvement in the action." *Howerton,* 708 F.2d at 382. "Although section 1983's under-color-of-law requirement is technically separate from the Fourteenth Amendment's state-action requirement, the two inquiries are closely related." *Johnson v. Knowles,* 113 F.3d 1114, 1118 (9th Cir. 1997), *cert. denied,* __ U.S. __, 118 S.Ct. 559, 139 L.[E]d.2d 401 (1997). "Because the plaintiffs are required to establish state action for purposes of their constitutional claims, we treat the under-color-of-state-law requirement and the state action requirement as equivalent." *Id.*

In *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), the Supreme Court set forth a two part test for determining when a party's actions are attributable to the state for purposes of section 1983. The Court stated the two part test as follows:

> First, the deprivation must be caused by the exercise of some right or privi-

> lege created by the state, or by a rule of conduct imposed by the state, or by a person for whom the state is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor because he is a state official, or because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.

Id. at 937.

The *Lugar* fair attribution test requires the existence of a state policy and a state actor. *Roudybush v. Zobel,* 813 F.2d 173, 176 (8th Cir. 1987). "The issue thus hinges on whether the defendant's 'conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State.'" *Id.* at 176 (quoting *Lugar,* 457 U.S. at 937). The *Lugar* court also indicated that it did not intend to abolish the *Monroe v. Pape* abuse of authority doctrine. *Monroe v. Pape,* 365 U.S. 167, 184-187, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). "In fact, the Court cited *Monroe v. Pape* as an example of when the two prongs of *Lugar* (state causation and state actor) collapse into one. Thus, even if a private party misuses a state statute, the deprivation can still be under color of state law if the authority of state officials puts the weight of the State behind the private decision." *Greco v. Guss,* 775 F.2d 161, 167 (7th Cir. 1985).

As the Supreme Court has noted, the principle of state action is "easily stated" while "the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action,' on the other, frequently admits of no easy answer." *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 172, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972). In *Lugar,* the plaintiff alleged that private party debt claimants in a state court action, in violation of due process, had maliciously used state prejudgment attachment procedures which resulted in wrongful seizure of his property under a levy later set aside. The *Lugar* court rules that, in a due process challenge to state attachment procedures, "invoking the aid of state officials to take advantage of state created attachment procedures . . . is sufficient when the state has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute." *Lugar,* 457 U.S. at 942.

In *Roudybush v. Zabel,* 813 F.2d 173 (8th Cir. 1987), the Eighth Circuit in discussing *Lugar* noted that "the Lugar Court made clear that a private party's unlawful use of a constitutional state procedural statute does not, by itself, satisfy the state policy component." *Id.* at 177. In summarizing its ruling the court noted:

> Accordingly, this court has held, as we do here, that *Lugar*'s state policy component is not met when the private party charged with an unconstitutional deprivation has allegedly acted unlawfully with respect to a

> constitutional state statute. Likewise, we have consistently found that *Lugar*'s state policy component is met when the party charged with an unconstitutional deprivation has acted in conformity with an allegedly unconstitutional state statute or well-settled custom.

Id. (citations omitted).

A private actor may also be liable under section 1983 if a plaintiff can establish a conspiracy or joint participation between the private actor and a state official to deprive the plaintiff of constitutional rights. *Id. See also Lugar,* 457 U.S. at 931; *Myers v. Morris,* 810 F.2d 1437, 1454 (8th Cir. 1987). "Private persons jointly engaged with state officials in a deprivation of civil rights are acting under color of law for purposes of section 1983. Section 1983 liability continues to require, at minimum, some overt and significant participation, by the party acting in concert with state action, in the challenged action." *Offut v. Kaplan,* 884 F.Supp. 1179, 1193 (N.D. Ill. 1995) (citations omitted). *See also Jordan v. Fox, Rothschild, O'Brien & Frankel,* 20 F.3d 1250, 1266 (3d Cir. 1994) ("Before private persons can be considered state actors for purposes of section 1983, the state must significantly contribute to the constitutional deprivation, *e.g.,* authorizing its own officers to invoke the force of law in aid of the private persons' request.").

In the context of guardianships, the courts have looked at the extent of the powers granted under state law, the purpose of the guardianship, and the authority exercised by the guardian, etc., in determining whether the guardian can be deemed to have acted under color of law for purposes of §1983. *See, e.g., Meeker v. Kercher,* 782 F.2d 153 (10th Cir. 1986) (guardian ad litem not acting under color of law); *Holley v. Deal,* 948 F.Supp. 711, 713 (M.D. Tenn. 1996) (inmate's limited guardian did not act under color of state law in consenting to administration of medication); *Forbes v. Rhode Island Brotherhood of Correctional Officers,* 923 F.Supp. 315 (D.R.I. 1996) (guardian ad litem, as a fiduciary legally obligated to act in a minor's best interests, cannot be considered a state actor); *Oltremari v. Kansas Social & Rehabilitative Service,* 871 F.Supp., 1331, 1345 (D. Kan. 1994) (As to any claim under §1983, guardian *ad litem* was not acting under color of law).

It appears the only instances in which a guardian has been held to be acting under color of law involve situations in which the guardian takes on substantial authority, by virtue of state law, for long term involvement in the minor's or incompetent's well-being and care. *Snyder v. Talbot,* 836 F.Supp. 19, 24 n.7 (D.Me. 1993). For instance, in *Thomas S. v. Morrow,* 781 F.2d 367 (4th Cir. 1986), relied on by Mr. King, Allen Childress, a regional adult mental health specialist with the North Carolina department of human resources, was appointed guardian over Thomas S. in February of 1982. Thomas had been placed for adoption by his mother at his birth in 1963. Until his eight-

eenth birthday, he was in the custody of Gaston County, North Carolina, Department of Social Services. During this period of time, he lived in more than 40 foster homes and institutions.

During his youth, Thomas had various behavioral problems eventually retreating into his own world and attempting suicide on several occasions. When he turned 18, Gaston County began proceedings to have him declared incompetent. After Childress was named guardian, he had Thomas removed from his current placement in Gerald's Lazy Acres Rest Home for the elderly and placed in the mental retardation unit at Broughton Hospital. The transfer was accomplished "in part to enable the guardian to assess Thomas's needs and to enable Gaston County to identify resources to meet those needs." *Id.* at 370-71. Thomas was evaluated but the recommendations of the evaluator's and staff were not carried out. After a number of interim placements, Thomas by his next friend brought suit against, *inter alia*, Childress in his capacity as guardian. The complaint alleges Thomas had been denied substantive due process, had not been provided minimally adequate treatment, and the hospitalization had imposed a degree of restraint on his liberty inconsistent with professional judgment concerning his appropriate treatment. *Id.* at 373.

Childress argued that the court lacked jurisdiction over him because he had not acted under color of state law and because his actions could not be attributed to the state. *Id.* at 377. The court, applying the two-part *Lugar* test, first

found that the "guardian's authority over Thomas is a 'right or privilege created by the State.'" *Id.* at 377. Second, it held that "the guardian is properly characterized as a state actor because 'he has acted together with or has obtained significant aid from state officials. . . .'" *Id.* at 377 (citation omitted). It found that the "actions of the guardian in joining with state officials to have Thomas moved from place to place irrespective of Thomas's will are legally indistinguishable from the seizure challenged in *Lugar.*" *Id.* at 378 (citation omitted). Moreover, the court concluded the guardian was properly joined under Rule 19 since in his absence complete relief could not be afforded. *Id.*

Although plaintiff stresses alleged irregularities in the obtaining of the order and the wording of the order, *i.e.*, it did not specify the guardianship was temporary and did not state it was limited to the ninety day period, he has advanced nothing to show that any conspiracy or joint activity involved the court or judge. He has made no showing that there was any understanding reached between Wilson, the court, and Johnson to deprive him of, or violate, his individual rights.

The mere use of the court as a forum is insufficient to constitute state action. *See e.g., Taylor v. Gilmartin,* 686 F.2d 1346, 1355 (10th Cir. 1982). This is true even if the court is used as part of a scheme, if there is no showing the court was part of the conspiracy but was instead used "in an effort to obtain some official appearance." *Id.* "The mere existence of a state guardianship order,

though erroneously issued, will not transform a defendant's conduct into state action." *Colombrito v. Kelly,* 764 F.2d 122, 132 (2d Cir. 1985).

It has been said that the "test of whether a joint participation or conspiracy exists is whether the facts alleged demonstrate that the private individual and the public official acted with a common understanding or 'meeting of the minds' to deprive plaintiff of his constitutionally protected rights." *Baer v. Baer,* 450 F.Supp. 481, 487 (N.D. Cal. 1978). *Baer* was a case brought by Lawrence Baer against his parents and the Freedom of Thought Foundation which acted as a deprogrammer. Mr. and Mrs. Baer at the direction of the Foundation filed a petition requesting appointment of a conservator for their adult son. The court issued the order and agents of the Foundation abducted the son and took him into custody with the assistance of the local police.

The defendants, the parents and the Foundation, argued the §1983 claim failed because they were not acting under the color of law. The court held the state court's granting of the conservatorship order amounted only to a "disinterested and indirect involvement by the state" which was "too insignificant to bring the discrimination within the pale of constitutional prohibitions." *Id.* at 486. It noted that the courts are open to all persons of the state and that the statute utilized to obtain the conservatorship was available to all citizens. *Id.* it concluded that a private misuse of the state law "presents neither a denial of constitutional rights under the Fourteenth Amendment

nor a claim upon which relief could be granted under the Civil Rights Act." *Id.* at 486.

The plaintiff also relied on the joint participation or conspiracy method of establishing defendants acted under color of law. He relied on the fact that uniformed members of the police department helped the Foundation forcibly take custody and pointed to portions of the complaint which he contended implicated the judge as well. The court held there were insufficient facts to show that the "private defendant and public official acted with a common understanding or 'meeting of the minds' to deprive plaintiff of his constitutional rights." *Id.* at 487. It pointed out that the police only "assisted in the effectuation of a court order, which is insufficient to establish that defendants and the police came to a 'meeting of the minds.'" *Id.* at 488. With respect to the state court judge, it noted there was no allegation that "the judge was conspiring with the defendants, or, short of conspiring with them, shared their intention to deprive Lawrence Baer of his constitutional rights." *Id. See also Orlando v. Wizel,* 443 F.Supp. 744, 747 (W.D. Ark. 1978) ("A state, merely by providing a forum and a means of enforcing regularly issued court orders, does not 'color' the action of the private litigants with state action.")

After careful consideration of the parties' arguments, the relevant case law, and the facts, most, if not all, of which are undisputed, we conclude under *Lugar* and other relevant authority, cited *supra,* that Johnson acted under color of law

for purposes of §1983. In this case, the state significantly contributed to the alleged constitutional deprivation. It was at the request of Tudor that Johnson came to Arkansas and at Tudor's suggestion that Johnson sought guardianship. After the guardianship order was entered, giving Johnson custody over the person and property of plaintiff, Tudor's involvement continued. In fact, it appears it was Tudor that requested assistance from the sheriff's office. Beavers then came to the Kings' home and assisted Johnson not only in taking custody of Mr. King but also in transporting him from Arkansas to California. Johnson was further aided in this endeavor by Wilson who acted as both her private attorney and as prosecuting attorney for the county in giving advice to Beavers regarding the propriety of Johnson's actions.

It is perhaps important to note that we are not ruling that guardians in all instances and under all circumstances act under color of law for purposes of §1983; rather, our holding is limited to the facts of this case. Additionally, we are making no ruling or comment on the merits of the §1983 claim itself. Instead, we merely hold that Johnson, a private individual, acted under color of law for purposes of §1983.

2. §1983—Qualified Immunity or Good Faith Defense.

Johnson argues qualified immunity is available for private defendants faced with a threat of liability under §1983 actions other than an action

arising out of replevin, garnishment, or attachment. She concedes that the Supreme Court in *Wyatt v. Cole,* 504 U.S. 158, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992) held that qualified immunity was not available to private entities faced with §1983 liability for invoking a state replevin, garnishment or attachment statute.

In *Wyatt* certiorari had been granted on the question of "whether private persons, who conspire with state officials to violate constitutional rights, have available the good faith immunity applicable to public officials." *Id.*, 112 S.Ct. at 1834. The Supreme Court stated the "precise issue encompassed in this question, and the only issue decided by the lower courts, is whether qualified immunity, as enunciated in *Harlow,* is available for private defendants faced with §1983 liability for invoking a state replevin, garnishment or attachment statute." *Id.* The Supreme Court answered this question negatively. *Id.*

It noted the reasons for recognizing such an immunity with respect to public officials was based "on the special policy concerns involved in suing government officials." *Id.*, 112 S.Ct. at 1833 (citations omitted). It concluded these "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* Among the rationales identified was the necessity of preserving the public officials ability to "serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service." *Id.* (citations omitted). It said that "[q]ualified immunity strikes a

balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Id.* (citations omitted). "In short, the qualified immunity recognized in *Harlow* acts to safeguard government, and thereby protect the public at large, not to benefit its agents." *Id.*

With respect to private parties, the Supreme Court noted:

> These rationales are not transferable to private parties. Although principles of equality and fairness may suggest, as respondents argue, that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability, as do their government counterparts, such interests are not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion. Unlike school board members, or Presidential aides, private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good. Accordingly, extending *Harlow* qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter

> public service. Moreover, unlike with government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes. In short, the nexus between private parties and the historic purposes of qualified immunity it simply too attenuated to justify such an extension of our doctrine of immunity.

Id., 112 S.Ct. at 1833-34 (citations omitted). The Court, however, did "not foreclose the possibility that private defendants faced with §1983 liability under *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), could be entitled to an affirmative defense based on good faith and/or probable cause or that §1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens." *Id.*, 112 S.Ct. at 1834.

Since *Wyatt*, the courts have struggled with the question of when, if ever, qualified immunity should extend to private individuals. In *McKnight v. Rees*, 88 F.3d 417 (6th Cir. 1996), the Sixth Circuit was faced with the question of whether qualified immunity should be extended to correctional officers employed by a private corporation under contract with the State of Tennessee. The court first examined whether the tradition of immunity was firmly rooted in the common law. *Id.* at 420. It noted this factor informed its analysis but the "presence of absence of immunity found

there is not necessarily dispositive." *Id.* Next, it examined whether "strong public policy reasons supported the recognition of qualified immunity in particular cases." *Id.* In this connection, it examined the nature of the functions with which the particular individual had been entrusted. *Id.* "Finally, when determining whether public policy supports the grant or denial of immunity, '[w]e do not have a license to establish immunities from [section] 1983 actions in the interests of what we judge to be sound public policy." *Id.*

It noted several circuits had read *Wyatt* narrowly as "applying only to cases in which a private party invokes state law to pursue a private interest." *Id.* (citing *Eagon v. Elk City,* 72 F.3d 1480, 1489 (10th Cir. 1996). Following this reasoning, several circuits have held that qualified immunity protects private defendants fulfilling government contracts, or following court orders, or who perform duties at the request of a state actor. *McKnight,* 88 F.3d at 421-22. *See e.g. Warner v. Grand County,* 57 F.3d 962 (10th Cir. 1995) (qualified immunity extended to private crisis center director conducting strip search at the request of search officers); *Williams v. O'Leary,* 55 F.3d 320 (7th Cir.), *cert. denied,* 516 U.S. 993, 116 S.Ct. 527, 133 L.Ed.2d 434 (1995); *Sherman v. Four County Counseling Center,* 987 F.2d 397 (7th Cir. 1993) (qualified immunity for private psychiatric center for involuntary detention of allegedly mentally ill patient at the request of arresting officer); *Frazier v. Bailey,* 957 F.2d 920 (1st Cir. 1992) (qualified immunity for social workers under con-

tract with the state to provide investigation of child abuse claims).

In *McKnight,* the Sixth Circuit indicated its belief that too much emphasis had been placed by some circuits on the functions performed by the private party. While it did

> not disagree that we must examine the function or nature of the conduct at issue as an initial matter, [it did] not believe the analysis begins and ends with asking the question whether the private party is performing a government function. We must also examine whether the "special policy concerns involved in suing government officials," *Wyatt,* 504 U.S. at 167, 112 S.Ct. at 1833, also support the grant of qualified immunity to private actors performing what are traditionally governmental functions, as is the case here. Therefore, we next discuss whether the public policy underpinnings of qualified immunity support extending its protections to the private defendants here. . . .

McKnight, 88 F.3d at 423.

On the facts before it, the court concluded that privately employed correctional officers were serving the public interest by maintaining a correctional facility but noted that they were not primarily motivated by a desire to further public in-

terests. *Id.* at 424. Rather, it noted that a private corporation's aim was to maximize profits. *Id.* "[T]his increased threat of injury by violation of constitutional guarantees counsels against granting qualified immunity to correctional officers employed by a private corporation to run a state's prison facilities." *Id.* The court also noted that denial of qualified immunity in that situation would not "deter talented candidates from entering public service." *Id.* The court therefore declined to grant qualified immunity to the correctional officers. *Id.* at 425. *See also McDuffie v. Hopper,* 982 F.Supp. 817 (M.D. Ala. 1997) (Private party doctors and mental health care providers not eligible for qualified immunity from suit based on suicide of prisoner despite their status as government contractors since they were performing at their own behest and motivated by the desire to make a profit).

Then in *Richardson v. McKnight,* __ U.S. __, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997) the Supreme Court affirmed the Sixth Circuit and held that prison guards who are employees of a private prison management firm were not entitled to qualified immunity. It found the following four aspects of *Wyatt* relevant: (1) that §1983 basically seeks to deter state actors from using the badge of their authority to deprive individuals of federally guaranteed rights although it can sometimes impose liability on private individuals; (2) a distinction exits between an immunity from suit and other kinds of defenses; (3) §1983 immunities are rooted in the common law and supported by strong policy reasons; and (4) *Wyatt* was limited to

the facts before it and did not answer the qualified immunity question with respect to all private individuals irrespective of the nature of their relation to the government, position, or the kind of liability at issue. *Richardson,* 117 S.Ct. at 2103-04.

On the question before it, the Court noted that history did not reveal a firmly rooted tradition of immunity applicable to privately employed prison guards. *Id.* at 2104. In examining the history and purposes of the immunity doctrine, the Supreme Court stated:

> Our examination of history and purpose thus reveals nothing special enough about the job or about its organizational structure that would warrant providing these private prison guards with a governmental immunity. The job is one that private industry might, or might not, perform; and which history shows private firms did sometimes perform without relevant immunities. The organizational structure is one subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide—pressures not necessarily present in government departments. Since there are no special reasons significantly favoring an extension of governmental immunity, and since *Wyatt* makes clear that private actors are not *auto-*

> *matically* immune *(i.e.,* §1983 immunity does not automatically follow §1983 liability), we must conclude that private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a §1983 case.

Id., 117 S.Ct . at 2108.

The Supreme Court closed with three caveats. First, it noted that it addressed only the question of §1983 immunity and not whether the defendants were acting under color of law and thus subject to liability under §1983. *Id.* Second, it noted that it had answered the immunity question narrowly in the context in which it arose. *Id.* Third, it said that its ruling did not foreclose the possibility that a "special 'good faith' defense" might exist. *Id.*

Prior to the *Richardson* decision, some circuits had read *Wyatt* broadly and indicated that it foreclosed the possibility of qualified immunity being granted to private individuals. *See e.g. Victor Research, Inc. v. Howard & Howard Attorneys, P.C.,* 76 F.3d 692 (6th Cir. 1996) (Private individuals not granted qualified immunity on *Bidens* claim); *Jordan v. Fox, Rothschild, O'Brien & Frankel,* 20 F.3d. 1250, 1276 (3d Cir. 1994) ("[The availability of qualified immunity to private person who act under color of law is no longer an open question. It is settled. Private persons cannot assert it.").

Prior to *Wyatt*, the Eighth Circuit had held that qualified immunity extended to private defendants. *See e.g., Waterdown Equip. Co. v. Norwest Bank Waterdown, N.A.*, 830 F.2d 1487, 1489-90 (8th Cir. 1987). It appears that the Eighth Circuit has not addressed this issue since the Supreme Court's decisions in *Wyatt* and *Richardson*.

Under the circumstances involved in this case, we conclude qualified immunity is not available to Marilyn Johnson. There is no firmly rooted tradition of immunity to private guardians. Granting immunity in this situation would not protect the government's ability to perform its functions or serve the public good; nor would qualified immunity in this situation ensure that qualified candidates would not be deterred from entering public service.

Those circuits declining to extend qualified immunity have generally recognized a good faith defense. *Vector Research*, 76 F.3d at 699; *Jordan*, 20 F.3d at 1776-77; *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir. 1993). This defense has been recognized under "principles of equality and fairness" which suggest "that private defendants 'should have some protection from liability.'" *Wyatt*, 994 F.2d at 1118 (citation omitted). The Fifth Circuit on remand in *Wyatt* held "that private defendants sued on the basis of *Lugar* may be held liable for damages under §1983 only if they failed to act in good faith in invoking the unconstitutional state procedures, that is, if they either knew or should have known that the statute upon which they relied was unconstitutional." *Id.*

The test is a subjective one. *Jordan,* 20 F.3d at 1276 (Malice in this context means a creditor's subjective appreciation that the act deprives the debtor of his constitutional right to due process). "A good faith defense . . . is likely to be based in large part on the facts of the case, with the suit only being dismissed after trial, or on summary judgment if the defendant can show that there is no material dispute as to the facts." *Duncan v. Peck,* 884 F.2d 1261, 1266 (6th Cir. 1988).

This good faith defense has most frequently been applied when the statute under which the private individual acted was somehow constitutionally infirm. For instance, the Fifth Circuit said "private defendants should not be held liable under §1983 absent a showing or malice and evidence that they either knew or should have known of the statute's constitutional infirmity." *Wyatt v. Cole,* 994 F.2d 1113, 1120 (5th Cir. 1993). *See also Jordan,* 20 F.3d at 1276 (" '[Malice in this context means a creditor's subjective appreciation that its act deprives the debtor of his constitutional right to due process.").

Johnson contends there is no genuine issue of material fact regarding her good faith in connection with her actions. She suggests that there is simply no evidence she acted with malice or with the intention of violating her father's constitutional rights. She asks the court to consider the following: (1) she came to Arkansas only after she was called by Tudor; (2) Tudor suggested Johnson seek guardianship and take her parents to Cali-

fornia; (3) she observed her parents' situation and her father was seen by a physician prior to the guardianship being sought; (4) she sought an attorney's advice; (5) after his own investigation, the attorney represented that the grounds existed on which to seek the guardianship; (6) a guardianship order was obtained from the appropriate court; and (7) the order gave her lawful authority over her parents.

Mr. King has not alleged that the Arkansas statutory provisions are themselves unconstitutional. Rather, he merely challenges the way they were utilized in this case. Specifically, he points to the following deficiencies: (1) Johnson sought a permanent guardianship on a temporary guardianship time scale; (2) despite the return of service showing service on him, Mr. King denies he was personally served with the petition; (3) service, if it did occur, did not occur until the Monday following the filing of the petition despite Johnson's knowledge of the whereabouts of her parents; (4) a full hearing on the merits occurred three working days after the filing of the petition; (5) the order was not limited to 90 days and in fact did not state on its face how long it was to remain in effect; (6) Johnson did not prove her case by clear and convincing evidence nor did she support her case by oral testimony or a sworn statement from a professional; and (7) the letter from Dr. Patterson is unsworn and should never have been submitted to the court. In short, Mr. King contends that most of the rules were broken or bent by Johnson and Wilson to clear the way for Johnson to take Wayne to California against his will. Mr.

King's arguments fail simply because there has been no showing that any of these errors are attributable to her or that she ever knew of the procedural irregularities.

We see no evidence that indicates Johnson was aware or knew that her actions in applying for guardianship of her parents under the Arkansas statutory procedure might violate their rights. Although plaintiff alleges that Johnson utilized the otherwise constitutional procedures, in an unconstitutional way, he has presented no evidence, other than his assertions, from which an inference can be drawn that Johnson acted in bad faith or with malice. *See e.g., Duncan v. Peck,* 844 F.2d 1261, 1268 (6th Cir. 1988) (summary judgment appropriate in §1983 action where no material question of fact as to defendant's good faith reliance on attorney's advice); *Nemo v. City of Portland,* 910 F.Supp. 491, 499 (D. Or. 1995) (summary judgment appropriate in §1983 action when park employee relied in good faith on his employer's policy, which was not patently unconstitutional, and plaintiffs presented no evidence from which it could be inferred employee was acting in bad faith).

Mr. King further argues that to be entitled to a good faith defense Johnson must show she at least met the minimum of her fiduciary duties which requires compliance with the guardianship statutes. Further, he argues good faith in this context ought to take into account the Arkansas policy that the least restrictive alternatives ought to be sought in a guardianship proceeding. He

contends these considerations are particularly important given the extent of the power given a guardian. As evidence of malice, he points to the procedural irregularities, the fact that Johnson did not contact her other relatives, the fact that her husband told Wayne's sister not to come, and the friction between Johnson and Mr. King.

It appears Johnson merely followed the advice of her attorney and Tudor and sought guardianship of her parents. Plaintiff has pointed to no evidence from which a reasonable trier of fact could drawn inference of malice. Under the circumstances presented herein, we conclude Johnson is, as a matter of law, entitled to a good faith defense.

3. Outrage.

To prove that a party has intentionally inflicted emotional distress the following elements must be satisfied: (1) the actor intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct, (2) the conduct was extreme and outrageous, was beyond all possible bounds of decency, and was utterly intolerable in a civilized community, (3) the actions of the defendant were the cause of the plaintiff's distress, and (4) the emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it. *The Limited Stores, Inc. v. Wilson,* 317 Ark. 80, 876 S.W.2d 248 (1994); *Angle v. Alexander,* 328 Ark. 714, 945 S.W.2d 933 (1997). "The test for outrage is an extremely narrow test

that is committed by the most heinous conduct." *Forrest City Machine Works, Inc. v. Mosbacher,* 312 Ark. 578, 585, 851 S.W.2d 443 (1993).

The Arkansas Supreme Court has consistently given a narrow view to the tort of outrage, and requires clear-cut proof to establish the elements in outrage cases. *Croom v. Younts,* 323 Ark. 95, 913 S.W.2d 283 (1996). Clear-cut proof, however, does not mean proof greater than a preponderance of the evidence. *Croom, 323 Ark.* at 102 (citations omitted). The court has cautioned that merely describing the conduct as outrageous does not make it so. *Renfro v. Adkins,* 323 Ark. 288, 914 S.W.2d 306 (1996).

We must first decide whether appellant's accusations, taken as true, state a claim for the tort of outrage. If a party cannot state a claim for outrage, then any unresolved factual issues are simply irrelevant. *Holloman v. Keadle,* 32 Ark. 168, 931 S.W.2d 413 (1996).

Johnson argues the conduct at issue clearly falls short of constituting extreme, outrageous conduct under Arkansas law. She contends she merely acted as a concerned daughter and heeded the advice of Tudor, Wilson and Dr. Patterson, and sought guardianship of her parents so that she could take them to live with her in California. Once there, she says she voluntarily withdrew her petition for conservatorship of her father in California and also voluntarily terminated the guardianship over her father in Arkansas. Thus, she concludes no reasonable juror would consider her

acts atrocious and utterly intolerable in a civilized society.

We agree. While the entire situation is unfortunate, we believe plaintiff has failed to show the existence of any genuine issue of material fact on this claim. As we noted above, the Arkansas courts have consistently taken a strict view of what constitutes conduct egregious enough to constitute the tort of outrage. Clearly, the conduct at issue falls short of that required under Arkansas law.

4. False Imprisonment.

False imprisonment has been defined as the unlawful violation of the personal liberty of another, consisting of detention without sufficient legal authority. *Headrick v. Wal-Mart Stores, Inc.*, 293 Ark. 433, 738 S.W.2d 418 (1987). Any express or implied threat of force whereby one is deprived of his liberty or compelled to go where one does not wish to go is an imprisonment. *Pettijohn v. Smith et al.*, 255 Ark. 780, 502 S.W.2d 618 (1973). It is well established that the restraint constituting a false imprisonment may be threats of force which intimidate the plaintiff into compliance with orders. Restatement (Second) of Torts §40 (1965). Although the plaintiff is not required to incur the risk of personal violence by resisting until force is actually used, it is essential that the restraint be against the plaintiff's will. Submission to the mere verbal direction of another, unaccompanied by force or threats of any character, does not constitute false imprisonment. If one agrees of one's own

free choice to surrender freedom of motion, as by accompanying another voluntarily to clear oneself of suspicion, rather than yielding to the constraint of a threat, then there is no imprisonment.

Johnson argues she had the legal authority, as evidenced by the order of guardianship, to take her father and mother to California to live in her home. Thus, she contends no cause of action for false imprisonment may lie against her.

Mr. King argues Johnson did not have the lawful authority to take him anywhere because the procedures for appointment of a guardian were not followed property. Thus, he argues, anything she did was illegal because she was not properly appointed guardian.

In this case, Johnson sought and obtained a guardianship order. Despite Mr. King's assertions to the contrary there has been no evidence presented which shows Johnson had any idea the procedures used to obtain the order were apparently irregular. Additionally, she acted only after being advised that her parents' situation was desperate and then acted upon advice of counsel and in an apparent good faith belief that she was acting in the best interests of her parents. We hold that no claim of false imprisonment will lie under the circumstances.

5. Collateral Estoppel.

Having granted summary judgment on each claim, we need not address her argument that

plaintiff is collaterally estopped by the guardianship order from now bringing the §1983 action, or the false imprisonment, or outrage claims.

Conclusion.

For the reasons stated, a separate order will be entered granting Johnson's summary judgment motion.

Dated this 1st day of May, 1998.

H. FRANKLIN WATERS
United States District Judge

U. S. Const. Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

U. S. Const. Amend. XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28-65-212. Evaluations.

(a) A professional evaluation shall be performed prior to the court hearing on any petition for guardianship except when appointment is being made because of minority, disappearance, detention, or confinement by a foreign power, or pursuant to §28-65-218. The evaluation shall be performed by a professional or professionals with expertise appropriate for the respondent's alleged incapacity.

(b) The evaluation shall include the following:

(1) The respondent's medical and physical condition;

(2) His adaptive behavior;

(3) His intellectual functioning;

(4) Recommendation as to the specific areas for which assistance is needed and the least restrictive alternatives available.

(c) (1) If no professional evaluations performed within the last six (6) months are available, the court will order an independent evaluation.

(2) if the petition is granted, the cost of the independent evaluation will be borne by the estate of the incapacitated person. In the event the petition is denied, the costs will be borne by the petitioner.

(d) (1) The court may request the assistance of a Department of Human Services resource person to gather records, investigate the respondent's condition, and help arrange for appropriate professional evaluations.

(2) The Department of Human Services shall issue regulations to implement this provision.

(e) Any existing evaluations made by the Department of Human Services of which the court has notice must be considered by the court.

Ark. Code Ann. §28-65-213

28-65-213. Hearing—Effect of Determinations.

(a) At the hearing, the respondent shall have the right to:

(1) Be represented by counsel;

(2) Present evidence on his own behalf;

(3) Cross-examine adverse witnesses;

(4) Remain silent;

(5) Be present;

(6) Require the attendance by subpoena of one (1) or more of the professionals who prepared the evaluation.

(b) The burden of proof by clear and convincing evidence is upon the petitioner, and a determination of incapacity shall be made before consideration of a proper disposition.

(c)(1) If the respondent is found to be incapacitated, the court shall determine the extent of the incapacity and the feasibility of less restrictive alternatives to guardianship to meet the needs of the respondent.

(2) If it is found that alternatives to guardianship are feasible and adequate to meet the needs of the respondent, the court may dismiss the action.

(3) If it is found that the respondent is substantially without capacity to care for himself or

his estate, a guardian for the person, estate or both shall be appointed.

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION. Wayne King, Plaintiff v. Marilyn Johnson and Charles Beavers, Defendants. Case No. 96-2219.

Affidavit of Wayne King

I, Wayne King, being first duly sworn, state upon oath:

1. My name is Wayne King. I reside in Johnson County, Arkansas. My date of birth is February 17, 1918. My mother is 96 years old.

2. On November 29, 1995 my daughter, the defendant Marilyn Johnson, and others were present at my home. They were attempting to take me and my wife to California where my daughter lives. I had no knowledge before November 29, 1995 of the plan to take me and my wife to California.

3. My daughter called the sheriff's office and Deputy Charles Beavers arrived at my home. I did not ask Beavers to come into my home. At no time while he was in my house did Beavers use my phone.

4. Beavers tried to persuade me to go with my daughter to California. I refused. Beavers physically picked me up out of my bed and took

me to the front door. On the way out of the house he bumped me into a door facing which injured my back. He also injured my side picking me up. To this day my back still hurts me.

5. I was still in my pajamas when I was taken out of my bed. I did not ask him to pick me up and did not want him to pick me up. I did not give him permission to pick me up.

6. I was carried from my bed, out the front door and placed in the back seat, behind the petition in an unmarked police car.

7. From my house I was taken to the back door of a doctor's office and given some kind of shot. I was then taken to the Little Rock airport by Beavers in his patrol car. I never saw Beavers radio anyone stating he was taking me to Little Rock. I sat in the back seat behind the petition on the way to Little Rock.

8. I was taken to the Little Rock airport where I was able to put on socks and shoes. My wife and I were kept separated by Beavers and Johnson. I was escorted by Beavers through the airport, into the plane and on the plane to California.

9. During the flight, I did not carry on a conversation with Beavers. During the flight, however, Beavers made the statement: "I won't do this again."

10. When we arrived in California, Beavers was asked how he would like to be paid. He asked for cash and received $430.00 in cash.

11. I did not know of the guardianship or of the guardianship hearing on November 21, 1995. I was not served with any papers which stated that a hearing was taking place on November 21, 1995.

WAYNE KING

Acknowledgment and seal of Vickie Francis, Notary Public.

Affidavit

Before the undersigned qualified official, personally appears the affiant, Claud King, who states the following under oath:

1. Wayne King (Wayne) is my brother. Bonnie King (Bonnie) was my sister-in-law. I am a resident of Fort Smith, Arkansas.

2. I visited Wayne approximately once a month in the summer and fall of 1995. I also kept in contact with the Risinger family who lived next door to Wayne and Bonnie.

3. Whenever I visited Wayne and Bonnie, the house was in fine condition. There would be some paperwork on tables, but the house was clean and well taken care of.

4. Wayne did take care of Bonnie and did take care of her incontinence. I know of two occasions where Wayne signed a check for me to go and buy the appropriate undergarments for Bonnie. My sister Pauline Buffington stayed with Bonnie and Wayne from July 1 to July 31, 1995 and reported that Wayne was taking good care of Bonnie.

5. I saw Bonnie eat a variety of foods. Wayne had arranged for meals-on-wheels to provide some food. Wayne would often add to the food that they provided.

6. Wayne had to take care of Bonnie day and night. Sometimes when I did visit him he was in bed, but he had been up during the night with Bonnie. Wayne may have been exhausted, but I did not see anything mentally wrong with him. He was not incapacitated in any way.

7. Wayne had taken care of Bonnie for nearly fifty years. In 1947 Bonnie had her parathyroid glands removed. From that time forward, Wayne took care of Bonnie and made sure she had all her medication.

8. In my opinion Marilyn and Wayne often seemed at odds, even before she took Wayne and Bonnie to California. On one occasion Wayne and Bonnie were staying with Marilyn in Paicines, California. Marilyn locked them out of the house.

9. I can remember only three visits by Marilyn to Arkansas to visit Wayne and Bonnie. She

visited them once when Bonnie was in the hospital in Fayetteville. Marilyn and her husband Steve visited Wayne and Bonnie once in Clarksville. The other time I remember Marilyn visiting was when she obtained the guardianship and took Wayne and Bonnie back to California.

10. Marilyn had two seizures in recent history, and she has hurt her back. Because of the seizures, she had to quit her job and is not licensed to drive a car.

11. When Marilyn went to Clarksville in November 1995, she did not tell me or anyone else in the family that she would seek a guardianship for Wayne and Bonnie. She did not tell anyone in the family that she had obtained the guardianship.

12. On November 29, 1995 my mother Lela King, with whom I live, received a call from Wayne at approximately 10:45 a.m. Wayne told her that the police were at his home and that he and Bonnie were being taken to California by Marilyn. My mother then called me at my place of employment, Fairview Elementary School. At the time my mother was 94 years old.

13. I left work and arrived in Clarksville about 12:15 p.m. I called Wayne's house and received no answer. I went to the Clarksville Police, and they told me that there was no report on Wayne and Bonnie. The clerk at the police station called the sheriff's office and was told that they had no information on Wayne and Bonnie. I then went to the Johnson County Senior Center. They

had no information about Wayne and Bonnie leaving. The records they did have were out of place. It took them quite some time to find their records.

14. I went to the house which was locked. Wayne was in the process of selling his house, and I called his realtor, Betty Killane of Century 21. The secretary at Century 21 told me that Wayne had called her on the phone and was angry. Ms. Killane came to the house with a young man and unlocked it. We entered the house and found the bed unmade. Ms. Killane and I made the bed.

15. We discovered that Marilyn, Wayne and Bonnie left for California without locking the garage, the rear area of Wayne's pick-up, or the storage building behind Wayne's house.

16. At no time while Marilyn was in Arkansas in November 1995 did she state to me or anyone else in my family that she intended to take Wayne back to California.

17. I am of majority age, of sound mind, and am fully competent to make this affidavit. I have read the above and foregoing statements, and they are correct to the best of my knowledge and belief.

Signed and executed this 6 day of August, 1997.

Further Affiant saith not.

CLAUD KING

Acknowledgment and seal of Vickie Francis, Notary Public.

Affidavit

Before the undersigned qualified official, personally appears the affiant, Pauline L. Buffington, who states the following under oath:

1. My name is Pauline L. Buffington. I am a resident of Fairfield, California. I am visiting my brothers Wayne and Claud King and my mother, Lela King.

2. I stayed with my brother Wayne King and his wife Bonnie in their home from July 17, 1995 to July 31, 1995. Wayne took good care of their home and made sure that her incontinent garments were changed when needed. When Wayne was tired, I would assist in taking care of Bonnie.

3. Bonnie ate a variety of foods and had enough to eat while I was there. Bonnie fed herself. In addition when meals were prepared, Bonnie would do small things, like folding napkins, to stay busy.

4. I went with Wayne and Bonnie to see the doctor in Fort Smith. Wayne drove and was a good driver. Bonnie wanted to go with Wayne. I also went with Bonnie and Wayne to Bonnie's beauty shop. She wanted to keep her hair neat.

5. I was contacted by Betty Tudor of the Arkansas Department of Human Services, Adult Protective Services. She told me that she had seen Bonnie's condition, but thought that Bonnie should stay at home. She wanted to know when I could come to Arkansas and help Wayne. It had been my understanding that Marilyn could not go to Arkansas because of her own medical condition. Before I could pick up my ticket I was contacted by Steve, Marilyn Johnson's husband, and told that I did not need to go. He also told me that they "did not want war."

6. I am of majority age, of sound mind, and am fully competent to make this affidavit. I have read the above and foregoing statements and they are correct to the best of my knowledge and belief.

Signed and executed this 6 day of August, 1997.

Further Affiant saith not.

PAULINE L. BUFFINGTON

Acknowledgment and seal of Vickie Francis, Notary Public.

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION. Wayne King, Plaintiff v. Marilyn Johnson and Charles Beavers, Defendants. Case No. 96-2219.

Affidavit of Warren Holcomb

Warren Holcomb, being first duly sworn, states upon oath:

1. My name is Warren Holcomb, and I am a resident of the Greenwood District of Sebastian County, Arkansas.

2. I was a Deputy Sheriff in Sebastian County, Arkansas from 1974 to 1990. From 1991 to 1997 I was a bailiff in Sebastian County, Arkansas.

3. I completed the basic course at the Arkansas Law Enforcement Training Academy in Camden, Arkansas in 1974. I have also attended several other in-service training exercises.

4. In my work as a Deputy Sheriff in Sebastian County, I had experience in enforcing court orders and in particular guardianship orders. Also, in my work as a bailiff I have attended several guardianship hearings.

5. I am familiar with the facts of this case involving the Plaintiff, Wayne King, and the Defendant, Charles Beavers.

6. All reasonable officers or sheriff's deputies know that they are always on-duty, even when they are in the private employ of someone else. All reasonable sheriff's deputies know that they are only empowered to enforce the law in their county.

7. No reasonable sheriff's deputy would have physically removed a ward from his home and taken him out of the county, much less out of the state, without a specific court order which directed the county sheriff or his deputy to do so.

8. It is not even arguably reasonable that an objective sheriff's deputy would think that the attached guardianship order, exhibit "A," would allow him to remove a ward out of the state. Every objectively reasonable sheriff's deputy would need to have a specific order to take a ward out of state before doing so.

WARREN HOLCOMB

Further, Affiant saith not.

Acknowledgment and seal of Vickie Francis, Notary Public.